IN

The Supreme Court

of the United States

October Term 1909

J. THORBURN ROSS,
Plaintiff in Error.

vs.

STATE OF OREGON,
Defendant in Error.

Motion to Dismiss Writ of Error and Argument on Motion

Now comes the State of Oregon, the defendant in error, by its counsel, A. M. Crawford, George J. Cameron and Martin L. Pipes, and moves this court to dismiss the writ of error herein for the reason that this court has no jurisdiction of the same, as will fully appear from the record and proceedings made and had in said cause in the Supreme Court of the State of Oregon, the relevant and material parts of which records and proceedings, together

with the laws of the State of Oregon and the decisions of the Supreme Court of the State of Oregon which are pertinent to this cause, are hereto annexed and made a part hereof.

A. M. CRAWFORD,
GEORGE J. CAMERON and
MARTIN L. PIPES,
Attorneys for Defendant in Error.

I.

The plaintiff in error was tried in the Circuit Court of the State of Oregon for Multnomah County on an information filed by the district attorney March 6, 1908, charging him with a violation of Section 1807 of Bellinger & Cotton's Annotated Codes and Statutes of the State of Oregon, which information was in words and figures as follows, to-wit:

In the Circuit Court of the State of Oregon, for Multnomah County.

State of Oregon, Plaintiff, v. J. Thorburn Ross, George H. Hill, John E. Aitchison and T. T. Burkhart, Defendants.	Information C 758.

The defendants, J. Thorburn Ross, George H. Hill, John E. Aitchison and T. T. Burkhart, are accused by the district attorney of the Fourth Ju-

dicial District of the State of Oregon, by this information of the crime of larceny, committed by converting to their own use money in their possession belonging to the State of Oregon, in violation of Section 1807 of Bellinger & Cotton's Annotated Codes and Statutes of the State of Oregon.

That on the 9th day of September, A. D. 1907, in the County of Multnomah and State of Oregon, the Title Guarantee and Trust Company was then and there a corporation organized and existing under the laws of the State of Oregon, and then and there carrying on a banking business and conducting a bank in the state and county aforesaid; that the defendant, J. Thorburn Ross, was then and there the duly elected and acting president and a duly elected and acting director of the said corporation; that the defendant, T. T. Burkhart, was then and there the duly elected and acting treasurer and a duly elected and acting director of the said corporation; that the said George H. Hill was then and there the duly elected and acting vice-president of the said corporation and a duly elected and acting director thereof, and the said John E. Aitchison was then and there a duly elected and acting director of the said corporation; and the said defendants were then and there a majority of the board of directors of said corporation.

That the said defendants, J. Thorburn Ross, George H. Hill, John E. Aitchison and T. T. Burkhart, on the 9th day of September, A. D. 1907, and

in the county and state aforesaid then and there being, and then and there pretending to act for and on behalf of the said the Title Guarantee and Trust Company, did then and there have in their possession and under their control as officers and directors of the said the Title Guarantee and Trust Company as aforesaid, $288,426.87 then and there belonging to the State of Oregon and then and there in the possession and under the control of the said defendants as aforesaid for the said State of Oregon and for safe keeping and to be returned by the said defendants to the said state and to the legal custodian of said money, upon legal demand therefor, the said money being then and there lawful money of the United States of America and bank notes, a more particular description of which is to the district attorney unknown, and then and there of the value of $288,426.87, and which said money then and there belonged to and was a part of the Irreducible School Fund, and of the Agricultural College Fund, and of the University Fund of the said state; the said defendants and each of them then and there well knowing that the said money so belonged to the said state and to the said Irreducible School Fund, and said Agricultural College Fund, and to the said University Fund of the said state as aforesaid; and the said defendants then and there having possession of the said money as aforesaid, belonging to the said state and to the said funds as aforesaid, and for the said state as

aforesaid, and for safe keeping and to be returned to the said state and to the legal custodian of said money, upon legal demand therefor as aforesaid, did then and there wilfully, unlawfully, feloniously and knowingly convert the same to their own use, the said defendants then and there well knowing that the said money so in their possession as aforesaid was then and there money belonging to the State of Oregon, and to the Irreducible School Fund and to the Agricultural College Fund, and to the University Fund of the said state as aforesaid, and which said money the said defendants before the said 9th day of September, A. D. 1907, pretending to act for and on behalf of the said the Title Guarantee and Trust Company, and as officers and directors of the said the Title Guarantee and Trust Company as aforesaid, had received for the State of Oregon, from the said George A. Steel, for the State of Oregon and for safe keeping to be returned by them, the said defendants to the said George A. Steel, as state treasurer, or to his successors in office, and to the State of Oregon the said money at the time it was received as aforesaid belonging to the said State of Oregon and to the Irreducible School Fund and to the University Fund, and to the Agricultural College Fund, of said state, all of which facts the defendants at the time they so received the said money as aforesaid well knew, and the said George A. Steel, being at the time said defendats received said money as aforesaid,

the duly elected and acting treasurer of said State of Oregon and as such treasurer the legal custodian of the said money, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the county aforesaid, this 6th day of March, A. D. 1908.

Witnesses subpoenaed, sworn and examined by the district attorney and for the State of Oregon.

F. W. FERGUSON,
GEO. BLACK,
GEO. A. STEELE.

JOHN MANNING,
District Attorney of the Fourth Judicial District of the State of Oregon.

"Endorsed."

Filed March 6, 1908.

F. S. FIELDS, Clerk.
By H. C. Smith, Deputy.

II.

The plaintiff in error was convicted upon said information and was sentenced by the said Circuit Court to five years' imprisonment in the state penitentiary and to pay a fine of $576,853.74, and in default of the payment of said fine to be imprisoned in the county jail of Multnomah County one day for each $2 of the fine, not exceeding 288,426 days.

III.

The plaintiff in error appealed from the judgment of conviction and sentence to the Supreme Court of the State of Oregon, which is the highest court of said state, with the result that the Supreme Court affirmed that portion of the sentence imposing imprisonment in the penitentiary for five years, and reversed and set aside the part imposing the fine and imprisonment in the county jail, all of which will appear from the written opinion of the Supreme Court of Oregon in the case of State v. Ross, which opinion is hereinafter set forth.

IV.

The plaintiff in error makes the following assignment of errors in this court, to-wit:

ASSIGNMENT OF ERRORS.

Comes now J. Thorburn Ross, plaintiff in error above named, and respectfully avers and shows in connection with his petition for a writ of error herein from the Supreme Court of the United States to the Supreme Court of the State of Oregon, that in the record, proceedings, decision and final judgment of said Supreme Court of Oregon in the above entitled matter, there is manifest error in this, to-wit:

First. The said Supreme Court of Oregon erred in holding that the amendment of Section 18 of Ar-

ticle VII of the Constitution of the State of Oregon, which became effective June 23, 1908, after the conviction of the plaintiff in error, did not operate to divest the court of jurisdiction to entertain and proceed further with the charge against the plaintiff in error of the commission of a crime defined and made punishable by the laws of the state, such charge being based wholly upon an unsworn information and in the absence of any indictment found by a grand jury, except to reverse and set aside the judgment of conviction based upon such unsworn information, and in not holding that any further prosecution of said charge would deprive the plaintiff in error of liberty without due process of law in conflict with Section 1 of the 14th Article of Amendment to the Constitution of the United States.

Second. The said Supreme Court of Oregon erred in holding that the act of the Legislature of Oregon, taking effect May 26, 1907, being Chapter 135 of the Laws of 1907, page 248, as construed by it, did not constitute an ex post facto law and as such was not repugnant to Section 10 of Article 1 of the Constitution of the United States.

Third. The said Supreme Court of Oregon erred in holding that the act of the Legislature of Oregon taking effect May 26, 1907, being Chapter 135 of the Laws of 1907, page 248, as construed by it, did not impair the obligation of the contract of de-

[illegible] thereinbefore referred into between the State of Oregon or its treasurer and the Title Guarantee and Trust Company, of Portland, Oregon.

Fourth. The said Supreme Court of Oregon erred in holding that the court below did not commit reversible error in excluding the sworn testimony of Edward Hirsh, A. H. Bush, W. H. Odell, John Sutherland, and William T. Phillips, to the effect that it had been the custom for 20 years prior to the 1st of June, 1907, for the state treasurer of Oregon to deposit all public funds, including the three educational funds involved in the proceedings, in banks in the form of general deposits subject to check, that the custom had been to segregate the funds in the custody of the treasurer only on the books of the depositaries, the banks in no case being advised of the nature of the funds deposited with them, and that this custom had been observed by the clerk of the state land board as well as by the state treasurer.

Fifth. The said Supreme Court of Oregon erred in ordering judgment to be entered and in entering judgment affirming the judgment of conviction of the plaintiff in error and the sentence of the trial court in so far as the same imposed imprisonment for five years in the Oregon state penitentiary.

V.

The information mentioned in paragraph I was filed against the defendant by the district attorney

of the State of Oregon for Multnomah County, pursuant to the authority conferred on him by Sections 1258, 1259 and 1260 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, which sections were passed by the Legislature of the State of Oregon and approved February 17, 1899, and are as follows:

Sec. 1258. District attorneys required to prosecute all crimes by information.

Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file, in the proper Circuit Court, an information charging any person or persons with the commission of any crime defined and made punishable by any of the laws of the state, and which shall have been committed in the county where the information is filed. (L. 1899, p. 99, Sec. 1.)

Sec. 1259. Form of information; manner of stating criminal act.

Information shall be substantially in the form prescribed in Section 1304 of the criminal code of the State of Oregon, except that the words "district attorney" shall be used instead of the words "grand jury" wherever the same occur; and the manner of stating the act constituting the crime, as set forth in the appendix to said criminal code, shall be sufficient in any such information in all cases where the forms there given are applicable;

and in other cases, forms may be used as nearly similar as the nature of the case shall permit. (L. 1899, p. 99, Sec. 2.)

Sec. 1260. Information how construed; when filed; proceedings under.

From the time any information is filed as provided in this act, the same shall be construed like an indictment, and shall be deemed to be in all respects the same as an indictment within the meaning of the present statutes of this state, and thereafter until and including final judgment and execution. The same proceedings shall be had, and with like effect, as in cases where indictments are returned by a grand jury: Provided, that when a defendant has been held to answer, as provided in Chapter XXII of Title XVIII of said criminal code, the information against him shall be filed on or before the first day of the next regular term of the Circuit Court, before which he is required to appear, unless such Circuit Court, upon good cause stated by the district attorney, shall extend the time; otherwise, on the second day of such term, or at the expiration of the time so extended, the court must order that the defendant if in custody be discharged, or if he has given bail that his sureties be exonerated, or money deposited in lieu of bail be refunded; but such order shall not be a bar to another prosecution for the same crime, unless it shall be a misdemeanor. (L. 1899, p. 99, Sec. 3.)

VI.

Section 1807 of Bellinger & Cotton' Codes referred to under which the information was brought, is as follows:

Sec. 1807. Larceny of public money.

If any person shall receive any money whatever for this state, or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such state, county, town, or corporation, or in which such state, county, town, or corporation has an interest, and shall in any way convert to his own use any portion thereof, or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof, as by law directed and required, or when lawfully demanded to do so, such person shall be deemed guilty of larceny; and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than 15 years, and by fine equal to twice the amount so converted, loaned, or neglected, or refused to be paid, as the case may be. (L. 1864; D. Cd., Sec. 554; D. & L., Sec. 559; H. C., Sec. 1772.)

VII.

In June, 1908, and pending the appeal of plaintiff in error from the judgment of the Circuit Court of the State of Oregon for Multnomah County to

the Supreme Court of the State of Oregon, Section 18, Article VII of the Constitution of Oregon was amended as follows:

Section 18 of Article VII of the Constitution of the State of Oregon shall be, and hereby is, amended to read as follows:

"Section 18. The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. No person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury. Provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form."

VIII.

Chapter 135 of Oregon Laws, 1907, page 248, is as follows:

AN ACT

To secure to the state interest on state moneys, to provide depositories for state funds; defining the duties of the state treasurer in relation

thereto; prescribing the security to be given and providing for the approval thereof.

Be it enacted by the people of the State of Oregon:

Section 1. It shall be the duty of the state treasurer, on the first Monday in June of each year, to designate such banks and trust companies within this state, as he may, under the provisions of this act, deem eligible to be made state depositories for the purpose of receiving on deposit funds of this state, and paying out the same on order or checks of the state treasurer.

Section 2. All banks and trust companies applying to be made state depositories under the provisions of this act, shall, on or before the first Monday in June of each year, file their application in writing with the state treasurer, said application to be accompanied with a sworn statement of the financial condition of said bank or trust company, at time application is made. The state treasurer shall pass upon all applications made in compliance with this act, and shall stamp upon the application "Approved" or "Rejected," and the same shall be duly signed by him. Any and all applications stamped "Approved" and signed by the state treasurer as herein provided, shall be deemed eligible to be made state depositories under the provisions of this act.

Section 3. The state treasurer shall deposit, and at all times keep on deposit in national banks doing

business in the State of Oregon, or other banks and trust companies doing business within this state, as shall have been approved under the provisions of this act as herein provided, the amount of money in his hands belonging to the several funds in the state treasury, and any such bank or trust company may file with the state treasurer its application for the privilege of keeping on deposit such funds or some part thereof. All such deposits shall be subject to payment when demanded by the state treasurer on his check, and any bank receiving and holding any such deposit as aforesaid, shall be required to pay and shall pay to the state for the privilege of holding the same, interest at the rate prescribed by the state treasurer as hereinafter provided, which rate of interest shall not be less than two per cent per annum, and subject also to such regulations as are imposed by law and the rules adopted by the state treasurer for receiving and holding such deposits; provided that the state treasurer may retain on hand in the state vault or in his control as such treasurer a sum not to exceed $100,000 as a reserve for the purpose of paying therefrom the current obligations of the state. The state treasurer shall annually on the last day of June, or when said day shall fall on Sunday, then on the next day preceding, fix the rate of interest to be paid on such deposits, which shall be not less than the rate hereinbefore in this act established, and

which rate when so established shall not be changed for such period of one year.

Section 4. The amount to be paid by any and all depositories under the provisions of this act, for the privilege of keeping such public funds on deposit, shall be computed on the average daily balance of the public moneys kept on deposit therewith, and shall be credited and paid to the state quarterly on the 1st day of January, April, July and October of each year, and such depository shall, quarterly, on the days aforesaid, render a statement in duplicate to the treasurer and secretary of state showing the amounts credited.

The treasurer shall require, and it is hereby made the duty of every such depository to keep accurate account of all such moneys deposited with it showing the amount deposited, and when deposited, and to render at the beginning of each and every month, to the treasurer and secretary of state, a statement, in duplicate, showing the daily balance of the state moneys held by it during the month next preceding, and the interest thereon, and all sums paid to the state for the privilege of keeping said moneys on deposit as aforesaid shall be credited by the treasurer to the general fund.

Section 5. For the security of funds so deposited under the provisions of this act, the state treasurer shall require all such depositories to deposit securities of the kind and character hereinafter described, or to give bonds for the payment

of such deposits and the interest thereon. Said bonds, when given, shall run to the State of Oregon, and, together with the securities offered, are to be approved as to the legal form by the attorney-general. Said bonds shall be conditioned that the depository shall at the beginning of each and every month render to the treasurer and secretary of state a statement in duplicate, showing the daily balance and the amount of money of the state held by it during the month preceding, and the amount of the interest thereon, and for the payment of said deposit and the interest thereon as hereinbefore provided, when demanded by the state treasurer, on his check at any time, and generally to do and perform whatever may be required by the provisions of the act and a faithful discharge of the trust reposed in such depository; provided, that no personal bonds shall be accepted. The bond provided for under this act shall be a surety company bond and shall be in substance as follows:

(Here follows form of the bond.)

All bonds and securities, after approval, shall be deposited with and held by the treasurer. It shall be the duty of the attorney-general to enter and prosecute to final determination all suits for the recovery of any penalty arising under the conditions of any bond required to be given by the provisions of this act.

Section 6. The state treasurer may designate a bank or trust company in the City of Salem or a

bank or trust company in the City of Portland as an active depository for the collection of any drafts, checks, certificates of deposit and coupons that may be received by him on account of any claim due the state.

Section 7. The bank or trust company designated as such active depository shall be required to give security to the state to be approved by the state treasurer, for the prompt collection of all drafts, checks, certificates of deposit or coupons that may be delivered to such active depository by the state treasurer for collection; also for the safe keeping and prompt payment on the state treasurer's order of the proceeds of all such collections; also for the payment of all drafts that may be issued to said state treasurer by such active depository.

Section 8. The state treasurer, on receipt of any draft, check or certificate of deposit on account of state dues, may place the same in such active depository for collection, and it shall be the duty of such active depository to collect the same without delay, without charge for its services for such collection or for exchange, and to notify the state treasurer when collected. The compensation to be paid by such active depository shall be fixed by the state treasurer upon the best terms obtainable for the state.

Section 9. The word "bonds" wherever used in this act shall be held to include bonds furnished by

surety companies authorized and qualified to do business in this state. The word "security" or "securities" shall be construed to include United States bonds, bonds of the State of Oregon and those for which it is ultimately liable, bonds of the several counties, cities, villages, towns and school districts of this state, warrants of the State of Oregon and of the several counties thereof on the current expense fund. No securities shall be approved unless their market value shall equal their par or face value. Upon payment to the state of the deposits and accrued interest for which security was given it shall be returned to the bank furnishing the same, and when such securities can be conveniently segregated, the amount thereof may be, in the discretion of the state treasurer, reduced in proportion as such deposits shall be reduced or repaid to the state.

Section 10. The state treasurer may cause an investigation to be made at any time to ascertain the sufficiency of any bank or security offered or given under this act, and to require new or additional security whenever in his judgment the safety of any deposit of state moneys under this act requires it; and such deposit shall be withdrawn unless such new or additional security be given. Any expense incurred in carrying out the provisions of this act shall be audited by the secretary of state and paid out of the general fund of the state. The state treasurer shall not be liable personally or

upon his official bond for any moneys that may be lost by reason of the failure or insolvency of any bank which becomes a depository under this act.

Section 11. The making of profit, directly or indirectly, by the state treasurer out of any money in the state treasury belonging to the state, the custody of which the state treasurer is charged with, by loaning or otherwise using it, or the removal by the state treasurer or by his consent of such moneys, or a part thereof, out of the vault or safe of the treasurer's department or out of any legal depository of such moneys, except for the payment of sums authorized by law to be paid, or for the purpose of depositing the same, under the provisions of this act, in banks which shall have qualified as depositories, shall constitute a felony, and on conviction thereof shall subject the treasurer to imprisonment in the state penitentiary for a term not exceeding two years or a fine not exceeding five thousand dollars ($5000), or by both such fine and imprisonment, and the treasurer shall be liable upon his official bond for all profits realized from such unlawful use of such funds.

Section 12. If the treasurer willfully fail or refuse at any time to do or perform any act required of him by this act he shall be guilty of a misdemeanor, and upon conviction thereof he shall be sentenced to pay a fine of not exceeding five thousand dollars ($5000).

Section 13. The offering or giving, directly or

indirectly, by any bank or depository, or by any officer or stockholder thereof, or by any other person or persons in its or their behalf, or by its or their knowledge, acquiescence or authority, or in its or their interest to the state treasurer of any gift, compensation, reward or inducement with the intent or for the purpose of inducing said treasurer to deposit funds of the state in any bank, contrary to any law of this state, shall constitute a felony, and shall, upon conviction thereof, subject the party or parties offending to imprisonment in the state penitentiary for a period not exceeding two years or by a fine not exceeding five thousand dollars ($5000), or by both such fine and imprisonment.

Section 14. The state treasurer is hereby authorized and empowered to sell any and all of the bonds, warrants and other securities that may be deposited as security for the deposit of any state funds in any depository under this act, at public or private sale, whenever there shall be a failure or refusal upon the part of any such bank, as a depository, to pay over the said funds or any part thereof upon the check or demand of the treasurer made upon such bank. Notice of the sale of such bonds, warrants or other securities under this act shall be given for a period of thirty days in a newspaper published in the City of Salem, Oregon, and when the sale thereof is made by the state treasurer, either at public or private sale, under this act, and such bonds, warrants or other securities have

been transferred by the state treasurer, the absolute ownership of such bonds, warrants and other securities rests in the purchaser or purchasers upon the payment of the purchase money to the state treasurer and upon filing a duplicate receipt therefor with the secretary of state. Should there be any surplus after paying the amount due to the state and expenses of sale it shall be paid over to the bank making the deposit.

Section 15. In the event all the funds of the state are not applied for by approved depositories under the provisions of this act, the state treasurer is authoried in his discretion to deposit the funds not so applied for and remaining in his hands, in some solvent bank or banks, trust company or trust companies upon the best terms obtainable.

Section 16. The word "funds" used in this act shall apply to all funds in the state treasury except the common school, agricultural college and university funds. Nothing in this act shall be construed to deprive the State Land Board of the power to invest or dispose of the funds derived from the sale of public lands as is now or may be provided by law.

Section 17. Whenever the state treasurer, in furnishing the bond required from him by law, shall furnish a bond executed by a surety company legally authorized to transact business in this state, and such bond shall be approved by the governor, the state shall pay the premium for such bond,

not to exceed one-third of one per cent per annum of the penalty named in the bond as executed and approved.

Whenever a person employed in the office of the state treasurer, required by law to furnish a bond, shall furnish a bond executed by a surety company legally authorized to transact business in this state, and such bond shall be approved by the state treasurer, the state shall pay the premium for such bond, not to exceed one-third of one per cent per annum of the penalty named in the bond so executed and approved.

Section 18. For the purpose of carrying out the provisions of this act there is hereby appropriated annually from any moneys in the state treasury, not otherwise appropriated, the sum of $1200.

Section 19. All acts and parts of acts in conflict herewith are hereby repealed.

Filed in the office of the secretary of state February 25, 1907.

IX.

Section 5 of Article VIII of the Constitution of the State of Oregon provides as follows:

The governor, secretary of state and state treasurer shall constitute a board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom, and

their powers and duties shall be such as may be prescribed by law.

X.

The Supreme Court of Oregon in the case of State v. Ju Nun, reported in 53 Oregon, page 1, construed the constitutional amendment referred to in paragraph VII, the opinion of the court being delivered in writing as required by law, and being as follows:

Statement by Mr. Chief Justice Bean.

Pursuant to the provisions of the act of February 17, 1899 (Laws 1899, p. 99), the district attorney of the fourth judicial district filed an information in the Circuit Court of Multnomah County charging the defendant with the crime of murder, without a preliminary examination and without any complaint having been filed against him. Upon the filing of the information a bench warrant was issued by order of the court and the defendant restrained of his liberty. He moved to set aside the warrant of arrest and information on the ground that the procedure adopted was violative of Section 18, Article VII, Constitution of Oregon, and Section 1 of the fourteenth amendment of the Constitution of the United States. This motion was overruled, and defendant entered a plea of not guilty. In due time the cause came on for trial before a jury, whereupon he objected to each juror as his name was drawn from the box, on the ground

that the law under which the jury was drawn was unconstitutional. These objections were overruled, and during the trial the state offered, and there was admitted over defendant's objection, an alleged dying statement of the deceased. The trial resulted in a verdict of manslaughter, and the defendant was sentenced to the penitentiary, from which judgment he appeals. Affirmed.

Opinion by Mr. Chief Justice Bean.

1. The questions raised by the motion to set aside the warrant of arrest and to quash the information were all discussed and decided adversely to defendant's position in State v. Guglielmo, 46 Ore. 250 (79 Pac. 577; 80 Pac. 103; 69 L. R. A. 466); State v. Tucker, 36 Ore. 291 (61 Pac. 894; 51 L. R. A. 246). The county court of each county is required to make up annually a jury list (Section 970 et seq. B. & C. Comp.), from which the jurors for the Circuit Court shall be drawn by the county clerk with the assistance of the sheriff or justice of the peace. Except in districts composed of no more than one county and having more than one judge of the Circuit Court the assistance of the sheriff or justice of the peace shall be dispensed with, and the drawing shall take place in open court in the presence of one or more of the judges and under his or their directions (Section 978, B. & C. Comp.). Multnomah County is the only county in the state constituting a judicial district and having more than one judge, and the contention for

the defendant is that the law providing for the drawing of jurors in open court applies to that county alone, and is therefore a special or local law "regulating the practice in courts of justice" and for "summoning and impaneling jurors," and void under Section 23, Article IV, Constitution of Oregon, which inhibits the legislature from passing special or local laws in certain enumerated cases, including those above stated.

2. The constitutionality of the act is sought to be raised by an objection made on the trial to the individual jurors as their names were drawn from the jury box; and we do not think it can be so raised. The objection is in effect a challenge to the panel and not to the poll, and such challenge has been abolished by statute. Section 117, B. & C. Comp.; State v. Fitzhugh, 2 Ore. 227; State v. Dale, 8 Ore. 229; State v. Savage, 36 Ore. 191 (60 Pac. 610; 61 Pac. 1128). At common law challenges to jurors were of two kinds—to the array or panel and to the poll. A challenge to the array was grounded upon objections which, if well taken, vitiated the whole panel or venire and required its discharge. A challenge to the poll was an objection to a particular juror. As the entire office of summoning the panel of jurors was at common law committed to the sheriff or other summoning officer, a right of challenge to the array on the ground of partiality or other disqualification of the officer was of the greatest importance to litigants; but in this

country the statutes generally provide that the selection shall be made by some designated officer or officers from a previously prepared list. A right to challenge the array is, therefore, of less importance than at common law, and consequently it has been absolutely abolished in some states (Baker v. State, 23 Miss. 243), and in others the statutes have prescribed the grounds upon which it can be made, and in such cases the challenge can be made only upon the grounds enumerated. State v. Bates, 25 Utah 1 (69 Pac. 70); People v. Schmidt, 168 N. Y. 568 (61 N. E. 907); People v. Jackson, 111 N. Y. 362 (19 N. E. 54); People v. Welch, 49 Cal. 174; People v. Wallace, 101 Cal. 281 (35 Pac. 862).

3. Our statute not only abolishes the right to challenge the array or panel, but defines a challenge as "an objection to an individual juror," and prescribes the grounds upon which it may be made. It is either peremptory or for cause. Section 119, B & C. Comp. A peremptory challenge is an objection for which no reason need be given. Id., Sec. 118. A challenge for cause is either that the juror is disqualified from serving in any action—that is, has been convicted of a felony, does not possess the qualifications prescribed by law for a juror or is of unsound mind, etc.—or that he is disqualified from serving in that particular action on trial on account of implied or actual bias. Id., Secs. 119-123 inclusive. These are the only challenges to a juror allowed under our procedure. It may be that,

if persons were called or summoned as jurors wholly without color of law, an objection on that ground would be available to a litigant, for in such a case the persons so called or summoned would not be a jury either de facto or de jure; and this is probably what Mr. Justice Boise had reference to in State v. Dale, 8 Or. 229, when he said that the challenge in that case should have been made to the individual juror that he was improperly or illegally drawn or summoned. Where, however, the drawing and summoning is under color of law and semblance of legal authority, and the jurors are accepted and treated by the court as legal jurors, they are at least such de facto; and it is not open to a litigant to object to their serving in a particular case on the ground that the law under which they were drawn is unconstitutional. The Constitution of New York prohibited the enacting of local laws for the selection and drawing of grand jurors. In 1881 the legislature passed an act regulating the drawing of such a jury in the County of Albany. The court declared the act unconstitutional but that no substantial right of the defendant was invaded by holding him to answer to an indictment returned by the grand jury drawn in pursuance thereof. The court said that the unconstitutionality of the law did not deprive the jury of the character of a grand jury in a constitutional sense; and, although selected in pursuance of a void law, it was selected under color of law and was a de

facto jury. People v. Petrea, 92 N. Y. 128. And so in this case no constitutional or substantial right of the defendant was affected by the manner in which the jurors were drawn. The particular jurors were competent and qualified. This was sufficient.

4. It is next claimed that the court erred in the admission in evidence of the dying declaration of the deceased. He was shot through the lungs about 11 o'clock at night and died the next afternoon. In the morning after his removal to the hospital he made a statement as to the cause and manner of his death; and it is the admission of this statement of which the defendant complains, on the ground that it did not appear that the deceased was under a sense of impending death at the time it was made. Before making the statement the attending physician had pronounced his case hopeless, and he was informed of that fact by an interpreter, and that in the opinion of the physician he could live but a few hours. The interpreter says:

"The doctor told me to tell him about his going to die soon. I told him. The first time he didn't seem so full to realize it until the second time, and then the doctor said his case is very serious and there is no chance for him whatever. And I told him that again, and he became realized full about the fact. As far as I can remember about what he said—after I told him what the doctor said about his condition—then he said, I think it might be

something like that, in those words, then he bowed his head that way (indicating), kind of shut his eyes and bowed his head to make peace, I think. That is as far as I can remember. He had such a sad feeling over him when I told him what the doctor said. I saw his countenance much in such a deep sad feeling; and he shut his eyes and bowed his head. 'Maybe, maybe,' he repeated twice, I think. I suppose he intended to say something, but was too sad and could not say it. The Chinese when they are sick and believe they are going to die, they will not say for the bad luck of it. They won't say that for anything. They are so superstitious about it."

This was, we think, a sufficient prima facie showing to entitle the statement to be admitted in evidence. State v. Fuller, 52 Ore. 42 (96 Pac. 456); State v. Doris, 51 Ore. 136 (94 Pac. 44).

5. The deceased was at the time dying from a gunshot wound and knew that fact. He had been informed through the interpreter that in the opinion of the attending physician he could survive but a few hours; and from the testimony of the interpreter it appears that he realized and apprehended his condition and the imminence of death. It is true that he did not himself express a belief in the near approach of death, but to render his statements competent as dying declarations it is not necessary that he should have done so. His condition of mind was quite apparent from his con-

duct and the surrounding circumstances. State v. Fletcher, 24 Or. 295 (33 Pac. 575).

Judgment affirmed.

ON PETITION FOR REHEARING.

Opinion by Mr. Chief Justice Bean.

6. After the defendant had appealed, but before the disposition of the appeal, an amendment to the constitution was adopted (June, 1908), which provides, among other things, that "no person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state except upon indictment found by the grand jury." It is now contended that by reason of this amendment the court is without jurisdiction and must order a discharge of the defendant. It is settled that the repeal of a law conferring jurisdiction takes away all right to proceed, under the repealing statute, as to all actions, suits or proceedings pending at the time of the repeal unless there is a saving clause in the repealing statute, and this is so in an appellate as well as the court of original jurisdiction. 1 Lewis, Sutherland's Statutory Construction 553, 554; Ex parte McCardle, 7 Wall. 506 (19 L. Ed. 264); Insurance Co. v. Ritchie, 5 Wall. 541 (18 L. Ed. 540); Sherman v. Grinnell, 123 U. S. 679 (8 Sup. Ct. 260; 31 L. Ed. 278); Keller v. State, 12 Md. 322 (71 Am. Dec. 596); State v. Allen, 14 Wash. 103 (44 Pac. 121); Mahoney v. State, 5 Wyo.

520 (42 Pac. 13; 63 Am. St. Rep. 64); Aaron v. State, 40 Ala. 307; Higginbotham v. State, 19 Fla. 557.

7. The constitutional amendment in question did not in terms repeal the law conferring jurisdiction upon the courts to hear and determine causes in which a defendant had been accused of a crime by information filed by a district attorney prior to the adoption, and we do not think it does by implication. The criminal code of 1864 declares that no person can be prosecuted for the commission of a crime but upon the indictment of a grand jury, unless otherwise provided by law. Hill's Ann. Laws 1892, Sec. 1204. It also provides in detail for the drawing and forming of a grand jury, defines its powers and duties, provides the form of indictments and the manner of finding and returning the same, and for all subsequent proceedings thereon. In 1899 the legislature adopted, as it had power to do, an act making it lawful for a district attorney to proceed by information against any person accused of the commission of a crime, without the intervention of a grand jury, and providing that the form of the information and the manner of setting out the acts constituting the crime should be substantially the same as provided in case of an indictment, and that from the time the information is filed it shall be construed like an indictment and shall be deemed to be in all respects the same, and thereafter until and including final

judgment and execution. Laws 1899, p. 99. This statute has not been repealed, and we think the recent constitutional amendment had no effect thereon, except to deprive a district attorney of the right to file an information in the Circuit Court by requiring that all prosecutions in that court thereafter instituted shall be by indictment. In all other respects the statute is in full force and effect, and the jurisdiction of the court to proceed with pending cases remains unimpaired. The language of the amendment is in the future tense, and is susceptible of a construction making it applicable to future and not pending cases, and it should be so construed (26 Am. & Eng. Enc. Law (2d ed.) 693; Trist v. Cabenas, 18 Abb. Prac. (N. Y.) 143; Seattle v. O'Connell 16 Wash. 625; 48 Pac. 412), especially in view of the consequences which would result from the contrary view (People ex rel. v. Potter, 47 N. Y. 375).

8. It will be observed that the amendment does not provide that a person shall not be "tried" or "prosecuted" for a criminal offense except upon indictment, but simply that he shall not be charged therewith. The word "charged" as applied to criminal proceedings may have different meanings, according to the subject-matter and the context. It may mean the accusation which precedes the formal trial, or it may mean the responsibility for the crime itself, and may be applicable to one who has been convicted and is serving a sentence. 2 Adj.

Words & Phrases 1069; Drinkall v. Spiegel, 68 Conn. 441 (36 Atl. 830; 36 L. R. A. 486). In common parlance it signifies the formal commencement of a criminal proceeding by the filing or returning of the accusatory paper. People v. Garnett, 129 Cal. 364 (61 Pac. 1114). When we speak of charging a person with the commission of a crime we ordinarily mean the commencement of the proceeding by the filing of a written complaint or accusation, and in our opinion it was in this sense that the words were used in the constitutional amendment in question. Hence, when it provides that no person shall be charged with a crime except upon indictment, it means that no prosecution shall hereafter be commenced except in the manner stated, and does not refer to pending cases. The amendment does not repeal or change the law under which defendant was tried and convicted, nor makes that a criminal act which was innocent when committed, or change the punishment, or alter the rules of evidence, or in any other manner affect any substantial right of the defendant. It was a mere change in the procedure, and is prospective, not retrospective. Smith v. Smith, 38 Conn. 397.

Judgment affirmed.

Former opinion adhered to. Affirmed.

XI.

Section 1807 of Bellinger & Cotton's Codes, referred to, was construed by the Supreme Court of

Oregon in the case of Baker v. Williams, reported in 42 Oregon, page 213, said opinion being as follows:

Baker v. Williams Banking Company.

On November 14, 1895, the Williams & England Banking Company, a corporation engaged in a general banking business at Salem, in this state, suspended payment, and in a suit brought for that purpose a receiver was appointed with power to convert its assets into cash for the payment of its obligations and to wind up its affairs. On January 3, 1896, by order of the court, the receiver published a notice to creditors requiring all persons having claims against the bank to present the same to him, with proper vouchers, within ninety days from the date of such notice, and also notifying the creditors, stockholders and all other persons interested to appear within a specified time and file objections, if any, to the allowance of claims so presented. In pursuance of this order claims were presented by Ladd & Bush for $10,000 and interest thereon at 10 per cent per annum, evidenced by two promissory notes; E. C. Giltner, agent, for $25,000 on five non-interest bearing certificates of deposit, issued by the bank to sundry persons, and by them assigned to Giltner; Phil Metschan, as state treasurer, for $8013.60, due on open account; E. J. Swafford, city treasurer of Salem, $7349.33, on open account, and W. H. Odell, clerk of the State Land Board, for $5047.27, on open account.

On July 3, 1896, the receiver reported to the court a list of all claims filed with him, including those above mentioned, stating, however, that none of the latter bore interest except the claim of Ladd & Bush, and asking for an order of distribution of the funds then in his hands. On the hearing of such report the receiver and Ladd & Bush appeared by their respective attorneys, and no objection having been filed to the claims so presented, it was "ordered, adjudged and decreed that said claims be allowed as presented and reported to this court by said receiver," describing them particularly as in the receiver's report. It was also ordered that "claims in which interest has been provided for by the terms of the obligation shall bear interest at the rate of interest stated herein from the date of each claim as stated herein," and that the receiver pay out of the funds then in his hands, on each of the claims so allowed, a dividend of 38 per cent, including interest on the interest bearing claims to the date of the failure of the bank. The order is silent, however, as to whether interest should be allowed on the non-interest bearing claims, except that it is specified therein that they bore no interest. Thereafter the receiver continued to pay dividends on the principal of the claims so allowed, and in December, 1901, having enough money on hand to pay the principal of such claims and leave a balance to be applied on interest, he petitioned the court for instructions as to the payment of interest

thereon. Ladd & Bush thereupon filed objections to any further payments of principal or interest on the claims of Giltner and Metschan, because such claims represent funds of the State of Oregon improperly loaned to and deposited with the insolvent bank by Metschan as state treasurer, for a consideration by way of interest to be paid to him, and such funds are the property of the state. They also object to the allowance of interest on the claim of Odell, for the reason that the amount thereof was deposited by him with the bank while acting as clerk of the State Land Board, or on that of Swafford, for the reason that it represents money belonging to the City of Salem which he wrongfully and unlawfully allowed to accumulate in his hands; and they object generally to the allowance of interest on any claim other than those bearing interest by contract. In support of their objections they aver that under their contract they are lawfully entitled to receive the full amount due them, principal and interest, and that there will not be sufficient funds to pay such amount and interest on non-interest bearing claims.

Metschan and Giltner demurred to the objections of Ladd & Bush, and their demurrer being overruled, they answered separately. Metschan by his answer denies that at the time the claim referred to in the petition was filed by him with the receiver the money represented thereby, or any part thereof, was state funds, and denies that the

money was ever loaned to the bank or improperly or unlawfully placed with it, and as a bar to this proceeding pleads the order and judgment of the court made in July, 1896, allowing his claim as presented. Giltner answered denying that the claim as presented by him was for money loaned to the defendant corporation by the treasurer of the State of Oregon and denying positively that any of the money represented thereby was state funds at the time the claim was presented by him to the receiver, and for a further defense pleading as a bar to this proceeding the judgment and order of the court made in July, 1896, allowing his claim. He then sets up affirmatively the issuance by the bank of the certificates of deposit to his several assignors, and the assignment thereof to him. Swafford and Baker, his assignee, filed an answer, in which they deny that the funds, or any part thereof, represented by the claim of Swafford was for money loaned to the bank, but aver that it was the property of the City of Salem deposited with the bank for safe keeping, and payable on demand; that Baker was one of the sureties upon the official undertaking of Swafford, and after the claim had been presented and allowed by the court he made a settlement with the city, and thereupon it and Swafford assigned to him the whole of the claim, and he is now the bona fide owner and holder thereof. Odell answered, denying some of the allegations of the petition and alleging in effect that

the claim, as presented by him to the receiver and allowed by the court, was for moneys tendered to him in the capacity of clerk of the State Land Board by various citizens of the state in the form of checks, drafts and postoffice orders, which he placed with the bank for collection, with intent, as was his usual custom, to withdraw from the bank at the end of the month and pay over to the state all of the money officially accepted and receipted for by it; that he had no personal interest in the fund and received no interest from the defendant on account of the deposits, and that on the failure of the bank he borrowed on his individual and personal credit and immediately paid to the state treasurer, for the use and benefit of the different funds to which it properly belonged, the whole of the amount due the state from him on account of said deposits. A reply was filed by Ladd & Bush to the answers of Giltner and Metschan, denying the force and effect of the order or judgment of July 3, 1896. Motions for judgment on pleadings were afterwards overruled, and evidence was taken and submitted to the court, which made its findings to the effect that the consideration and basis for the claims of Giltner and Metschan were funds of the State of Oregon improperly deposited with and loaned to the defendant corporation for interest, contrary to the laws of the state, and thereupon ordered and directed that no interest be paid upon either of said claims, but overruled the objection

as to other claimants. From this order Metschan and Giltner and Ladd & Bush appeal.

Affirmed.

Mr. Justice Bean, after stating the facts, delivered the opinion of the court.

1. It is contended by Metschan, Giltner, Odell and Baker that the order of July 3 1896, allowing their claims against the insolvent estate, and directing the payment of a dividend thereon is a conclusive adjudication of all questions sought to be litigated on this appeal. It is familiar law that an issue once adjudicated in a court of competent jurisdiction cannot be again litigated between the same parties or privies, and the judgment thereon is conclusive in another action on the same demand, not only as to every matter that was actually litigated, but as to every other question that might have been litigated. Neil v. Tolman, 12 Ore. 289 (7 Pac. 103); Morrill v. Morrill, 20 Ore. 96 (25 Pac. 362; 11 L. R. A. 155; 23 Am. St. Rep. 95). An order or decree of a court of equity regularly made in the matter of the receivership of an insolvent estate upon the petition of a creditor, allowing or disallowing a claim payable out of the fund in the hands of the receiver, is within this principle. It has twice been practically so held by this court. The question first arose in Rockwell v. Portland Sav. Bank, 35 Ore. 303 (57 Pac. 903), in which a creditor of the bank petitioned the court for an order requiring the receiver to list its claims and

directing that it be permitted to participate in the dividends theretofore declared and thereafter to be declared. The petition was denied, and on a motion to dismiss an appeal from the order it was held that it was final on the rights of the petitioner, because "it effectually and finally determines its right to participate in any dividends of the insolvent bank, whether declared before or after the entry of the order, and precludes the possibility of proceeding further in the premises." In another instance the receiver in the same case refused to pay a dividend on a claim of one of the creditors which on its petition had been allowed by the court, and on an appeal from the order requiring him to do so it was held that "the order of the court allowing the claim of the petitioner, made after the execution of the mortgage, was a final order, * * * and in our opinion is conclusive as to its right to participate in the dividends." Rockwell v. Port. Sav. Bank, 39 Ore. 241 (64 Pac. 338). And such seem to be the decisions of other courts. Trustees v. Greenough, 105 U. S. 527; Williams v. Morgan, 111 U. S. 684 (4 Sup. Ct. 638); Gumbel v. Pitkin, 113 U. S. 545 (5 Sup. Ct. 616); Standley v. Hendrie & B. Mfg. Co., 25 Colo. 376 (55 Pac. 723); Grant v. Superior Court, 106 Cal. 324 (39 Pac. 604).

It will be observed that in all the cases referred to the order or decree under consideration was based upon a petition, regularly filed, setting

out the facts constituting the claims. The petitioner thereby made himself a party to the suit, and the proceedings thereafter became in effect an independent suit or action brought by him to establish his claim; and the judgment or order rendered therein would naturally partake of the nature or characteristics of any other judgment or order and be entitled to the same effect. In the case at bar, however, the order allowing the claims now in controversy was not based upon the petition of the claimants, but upon a report of the receiver, containing a mere list of the persons filing claims with him, together with the nature and date of the claim, a statement as to whether it bore interest, and if so, the rate, date when filed and amount; and the order allowing the claims as presented was apparently ex parte and without notice to interested persons. It does not state that it was made after notice, and so far as the record shows no notice whatever was given of the filing of the receiver's report, and no opportunity given to file objections thereto. It is true the order recites that in the January prior thereto the receiver, by direction of the court, published a notice requiring all claims to be presented to him within ninety days from the date of the first publication thereof, and also requiring all objections to the allowance of claims to be filed within thirty days from the same date. It would scarcely be contended, however, that the court could thus cut off the right of cred-

itors, stockholders or others interested in the insolvent bank to object to the allowance of claims prior to the time such claims were required to be filed. It is therefore doubtful whether the doctrine as to the conclusiveness of an order or judgment allowing claims against an insolvent estate in the hands of a receiver, made after notice to interested parties, could apply in this case. But it is not necessary to decide that question. Ladd & Bush, the objectors here, voluntarily made themselves parties to the proceeding, appeared by counsel at the time the order was made approving the receiver's report and allowing the claims, and they are concluded by whatever the court decided at that time. The objection that the basis of the several disputed claims was public funds, wrongfully and unlawfully deposited in the insolvent bank by the custodians thereof under such circumstances and agreements that a court of equity would not entertain a proceeding for the recovery thereof, might have been insisted upon by them at the time the matter was pending, but not having been urged at that time, cannot be inquired into now at their instance. So far, therefore, as the legality and validity of the contested claims are concerned and the right of the claimants to participate in the distribution of the funds in the hands of the receiver, the order of July 3, 1896, is conclusive in this proceeding.

2. It is further urged, however, that the orde-

is not only conclusive as to the principal of the respective claims, but was a final determination of the right to interest thereon, and effectually barred the court from afterward considering that question. This contention is based on the theory that the order is a judgment or decree, within the meaning of the statute in force at the time it was made (Hill's Ann. Laws, Sec. 3587), providing that the rate of interest shall be eight per cent on judgments and decrees for the payment of money. In our opinion, however, it cannot be so considered, but is nothing more than an order passing the report of the receiver and allowing the claims presented to and listed by him as a basis for the distribution of the funds then in his hands and for subsequent distributions. It does not constitute a judgment or decree as ordinarily understood. It was made ex parte without adverse parties, without pleadings and without any issue of facts being tendered, and is therefore not entitled to be regarded in all respects as a judgment or decree. It was an order made by the court in the course of the distribution of the insolvent estate, approving and allowing certain claims against it, and to that extent is final and conclusive as to the validity of such claims on parties and privies; but it does not preclude inquiry into the question of interest on non-interest bearing claims.

3. The order itself indicates that the court did not intend to pass upon that question, but reserved

it for further consideration. The receiver in reporting a list of the claims filed with him stated specifically in each instance whether the claim bore interest or not; and the court allowed these claims "as presented and reported" by the receiver, incorporating in its order the statement that the particular claims in controversy bore no interest. In addition it provided that interest should be paid on interest bearing contracts at the rate therein specified, from the date of the obligation. The question of interest was therefore under consideration at the time, and the fact that the order contains no reference to the non-interest bearing claims leads naturally to the conclusion that the court did not intend such claims to bear interest unless in pursuance of a subsequent order. The question, therefore, whether the non-interest bearing claims are entitled to interest, and if so, from what date, is now to be determined without regard to the order of July 3, 1896, allowing such claims as the liability of the estate.

4. The statute provides that interest shall be due and payable on all moneys after the same become due, and on money received to the use of another and retained beyond a reasonable time without the owner's consent. Hill's Ann. Laws, Sec. 3587. Money deposited in a bank, in the absence of a special contract becomes due on demand, and if not paid will bear interest from that time. 16 Am. & Eng. Enc. Law (2d ed.) 1020, 1021. In case

of the insolvency of the bank, the presentation of a claim to the receiver for the money so deposited and its allowance by the court are equivalent to a demand within this rule, and thereafter the money is considered as withheld without the owner's consent. In Richmond v. Irons, 121 U. S. 27 (7 Sup. Ct. 788), the Supreme Court of the United States announces as the rule in reference to interest on claims against an insolvent bank that "in the case of book accounts in favor of depositors * * * interest would begin to accrue as against the bank from the date of its suspension." And in California, where they have a statute like ours, it is said in McGowan v. McDonald, 111 Cal. 57 (43 Pac. 418; 52 Am. St. Rep. 149), that "when a bank suspends business and refuses to pay its depositors, it thereafter clearly detains money which it received to their use, and under the provisions of the code must be held liable for interest thereon." See also Shepherd v. Shepherd's Estate, 108 Mich. 82 (65 N. W. 580); Harwood v. Larramore, 50 Mo. 414; In re Wainwright's Estate, 13 Phila. 336. The claims in controversy should therefore bear interest at the legal rate from the date of their allowance if they represent funds upon which the holders are entitled to receive interest.

5. It is contended by the objectors, however, that such claims represent public funds deposited with the insolvent bank by the custodians thereof and not the private funds of individual claimants,

and for this reason no interest should be paid them thereon. It is made a felony by statute for any person having in his possession any money belonging to the state, county, town or other municipality to convert to his own use or loan the same, with or without interest (Hill's Ann. Laws, Sec. 1772); and while a mere deposit in a bank for safe keeping is not inhibited by this provision, it is manifest that in case of the failure of the bank the officer is not entitled to interest in his own right on the fund so deposited, whatever the right of the state or municipality might be in the premises. If, therefore, the claims are in fact for public money, as the objectors allege, no interest should be allowed thereon. A public officer may not loan, with or without interest, any part of the public funds in his possession without being guilty of a felony; but he is required to keep such funds safely, and for that purpose may deposit them in a bank, provided they are at all times subject to his order, and there is no fixed period during which he has no right to demand their return. In re Law's Estate, 144 Pa. 499 (22 Atl. 831; 14 L. R. A. 103); Allibone v. Ames, 9 S. D. 74 (68 N. W. 165; 33 L. R. A. 785); State v. McFetridge, 84 Wis. 473 (54 N. W. 1096; 20 L. R. A. 223); State v. Hill, 47 Neb. 456 (66 N. W. 541); Thompson v. Territory, 10 Okla. 409 (62 Pac. 855). The deposit is made on his own personal responsibility, however; and if, in case of the failure of the bank, he makes the loss good, the

money deposited must necessarily become his property, and thereafter be considered and treated as such.

Now, the claim in favor of Odell was for money tendered to him in the capacity of clerk of the State Land Board by various citizens of the state in the form of checks, drafts and postoffice orders, which he placed with the bank for collection, intending, in accordance with his usual custom, to withdraw at the end of the month and pay over to the state all money that had been accepted and receipted for; and it is affirmatively alleged and conclusively proved that on the failure of the bank he borrowed on his own individual and personal credit and immediately paid to the state treasurer, for the use and benefit of the different funds to which it properly belonged, the whole of the amount due the state from him on account of such deposits. The claim in favor of Swafford was for money deposited by him as city treasurer with the bank for safe keeping, and it is stipulated that after the presentation and allowance of the claim his bondsmen settled with the city, whereupon he and the city assigned the claim to the defendant Baker, who is now the owner thereof. The loss to the state was therefore made good by Odell, and to the city by Swafford's bondsmen. There is no reason, therefore, either in law or equity, why they should not stand on exactly the same footing as other claim-

ants holding non-interest bearing contracts against the insolvent bank.

6. In the case of Giltner and Metschan, however, the evidence shows that the claims as presented were for money belonging to the state which had been deposited with the bank by Mr. Metschan as state treasurer; and there is neither allegation nor proof that the loss has been made up to the state or that such money at any time has ceased to be state funds. The amount represented by the claim presented by Metschan was on an open account to his credit as state treasurer. The claim is presented and verified by him in that capacity, and therefore on its face shows that it is state funds. The Giltner claim was originally evidenced by certificates of deposit issued in Metschan's name. A few days before the failure of the bank, however, the certificates were surrendered, the fund divided up and new certificates issued to several private individuals, who immediately assigned them to Giltner as agent for Metschan, so this claim is also, in fact, for state money deposited in the bank by Metschan. In view of the statutory provision making it a crime for an officer to convert public funds to his own use or to loan the same, with or without interest, it is clear that no interest should be allowed Metschan on either of these claims until it is affirmatively shown that the money has ceased to be public funds. If, after the failure of the bank or after the presentation and

allowance of the claim, he made the loss good to the state by paying the money into the state treasury, he became from that time the owner in his private capacity of the claims so presented and allowed, and would be entitled to interest thereon. But upon this question there is no allegation and no proof except the testimony of his successor in office that Metschan accounted to him for all the state funds by turning over some certificates of deposit and "a good many things that were representatives of money." This evidence is not only outside of the issues, but is insufficient to show that Metschan took over to himself the amount due from the insolvent bank by making the loss good from his private funds, and until such a showing the court cannot decree that interest be allowed thereon.

7. The objectors allege that at the time the claims were presented and allowed by the court the money belonged to the state. This allegation is denied by Metschan and Giltner. There was no evidence offered on the subject, however, except that the money was public funds at the time it was deposited in the bank, and it will be presumed that it continued to be such until the contrary is made to appear by the claimants.

8. The facts in relation to this matter are peculiarly within their knowledge, and hence the burden of proof is upon them to show that the money

has ceased to be public funds, and until they do so no interest can be allowed thereon.

It is insisted that none of the non-contract interest bearing claim holders are entitled to interest out of the funds in the hands of the receiver as against the claims of the objectors and all other parties holding interest bearing contracts, and Daniell, Chancery Pl. & Pr. (Vol. 2, 6 Am. Ed., p. 1253), is cited in support of this doctrine. An examination, however, of the test and the authorities referred to by the author shows that the principle there announced is based on a rule of the English chancery courts having the force and effect of a statute. See Garrard v. Lord Dinorben, 5 Hare 213.

Upon the record as presented the decree of the court below must be affirmed.

Affirmed.

XII.

The opinion of the Supreme Court of Oregon in the case sought to be reviewed herein is reported in 55 Oregon page 450, and is as follows:

[redacted] v. Ross.

From Multnomah. George H. Burnett, Judge.

Statement by Mr. Justice Eakin.

This defendant J. Thorburn Ross is charged by information, jointly with Geo. H. Hill, T. T. Burkhart and John E. Aitchison, with the crime of larceny, committed in Multnomah County, Oregon,

and upon change of venue the case was transferred to Marion County for trial. The substance of the charge is that on the 9th day of September, 1907, the Title Guarantee and Trust Company (hereafter referred to as the "Trust Company") was a corporation carrying on a banking business of which the defendants were directors and J. T. Ross president, Geo. H. Hill vice-president, T. T. Burkhart treasurer, and that the defendants on that date, pretending to act for said Trust Company, had in their possession and control for safe keeping, as officers and directors of the Trust Company, $288,426.87 belonging to the State of Oregon, and being a part of the irreducible school fund, agricultural college fund and the university fund (hereafter referred to as the "educational fund"); that defendants, well knowing that such money belonged to that fund, did then and there willfully, unlawfully and feloniously convert the same to their own use, which money, prior to that date, they, as officers and directors of the Trust Company, had received for the state for safe keeping from Geo. A. Steel as state treasurer.

The facts upon which the issues here arise are that the Trust Company, since the year 1904, has been engaged in banking, but not exclusively in such business; that it had also prepared abstracts of title, written title insurance, made mortgage loans, receiving compensation for such services as a broker; that it had sold real estate on commission

and performed other services for compensation; that on the 14th day of January, 1907, when Geo. A. Steel took the office of state treasurer he had $400,000 of the state's money on deposit, subject to his check, in various banks within the state. Of this sum $55,000 was deposited with the Trust Company. At that time there was no segregation of the funds of the treasurer as between the educational funds except on the books of the treasurer, and such banks had not been notified to which fund the deposits belonged. Thereafter Steel continued the account with the Trust Company in the name of "Geo. A. Steel, state treasurer," and deposits were made and checks drawn against the same from time to time until the 3d day of June, 1907, at which time the Trust Company had been designated by the treasurer as an active depository of the state under the provision of Section 6 of an act of the legislative assembly of the State of Oregon, adopted in the year 1907, providing for state depositories for state funds (Laws, 1907, p. 248), at which time, evidently for the purpose of complying with the terms of such statute, Steel segregated the funds, and accordingly wrote to the Trust Company as follows:

"State of Oregon, Treasury Department,
Salem, June 3, 1907.

The Title Guarantee and Trust Company, Portland, Oregon.

Gentlemen—I inclose herewith for credit of

Geo. A. Steel, state treasurer, educational, the following checks:

No. 319, Geo. A. Steel, state treasurer, on you $272,449.02

No. 24, Geo. A. Steel, state treasurer, on Ladd & Tilton 2,600.00

Total $275,049.02

Yours very truly,

GEO. A. STEEL,
State Treasurer."

Thereupon, on the 5th day of June, 1907, an account was opened on the books of the Trust Company entitled, "Geo. A. Steel, Treasurer, Educational," the first item of which was the credit of the above amount, and thereafter, prior to November 6, 1907, the time of the appointment of the receiver for the Trust Company, many other credits were made in that acount for checks sent by Steel for deposit therein, and on that day the balance to the credit of that account was $288,426.87. The remittances were all made in checks and drafts, except as above mentioned, and, except as stated, there was no evidence of possession of the money by defendants, or that the checks had been collected or converted into cash by the Trust Company, or any one. Until the 20th day of August, 1907, the Trust Company always had on hand cash exceeding the balance due from it on the educa-

tional account, but on the next day it was about $300 less than such balance. This deficiency increased thereafter until November 6, 1907, when the Trust Company's cash on hand lacked $274,882.73 of being equal to the balance due on such account, and on that date all its cash was turned over to the receiver.

Defendant Ross testified that he did not convert to his own use any money whatever belonging to the educational fund of the state. When asked, "How much money did you get from the State of Oregon as deposited by the state treasurer with the Trust Company?" his answer was, "I never received any money from the State of Oregon." A written demand was made by Steel, as treasurer, on the Trust Company, for the amount of such account on November 12, 1907, service of which was accepted for the Trust Company by defendant Ross, as president. Steel testified that he did the business with the bank, and had no business with defendants; that he might have corresponded with Ross, but thought not; may have talked with him about depositing these funds, after the law took effect, but does not recollect. But the account was segregated, and he says he did have an arrangement or agreement with Burkhart, Ross, Aitchison, or Hill, about the manner or arrangement by which these funds would be deposited in the bank, but did not think that Ross knew, at the time, any further than is disclosed

by Steel's instructions at the office. He says he probably spoke to him, but does not remember any conversation. The principal dealings were with Ross or Burkhart. He further testifies that pending the passage of the bill providing for depositories before the legislature of 1907, he probably consulted with Ross about it, and sent him copies of the bill.

The trial resulted in a verdict against the defendant of guilty, and a finding by the jury that the amount of money converted was $288,426.87. Thereafter defendant moved the court in arrest of judgment on the ground that the information does not state facts sufficient to constitute a crime, and also a motion for a new trial for insufficiency of the evidence to justify the verdict, and errors of law occruing at the trial, which motions were denied. Thereupon judgment was rendered against defendant that he be imprisoned in the penitentiary of the State of Oregon for the term of five years; that he be adjudged to pay a fine in the sum of $576,853.74; that he be imprisoned in the county jail of Multnomah County, Oregon, until such fine is paid, not exceeding 288,426 days; and that the state recover of and from the defendant its costs and disbursements. From this judgment defendant appeals.

Affirmed.

For appellant there was a brief with oral argu-

ments by Mr. Wallace McCamant, Mr. William P. Lord, and Mr. William Kaiser.

For the state there was a brief over the names of Mr. Andrew M. Crawford, attorney general; Mr. George J. Cameron, district attorney, and Mr. Martin L. Pipes, with oral arguments by Mr. Cameron and Mr. Pipes.

Mr. Justice Eakin delivered the opinion of the court.

1. The statute (B. & C. Comp.) upon which this prosecution is based provides:

"Sec. 1907. If any person shall receive any money whatever for this state * * * or shall have in his possession any money whatever belonging to such state * * * and shall in any way convert to his own use any portion thereof * * * such person shall be deemed guilty of larceny. * * *"

The first question for consideration relates to the character of the deposits made by the state treasurer with the Trust Company, whether they were general or special, and this depends on the terms of the statute of 1907, under which the deposits were made (Laws, 1907, p. 248), which took effect May 26, 1907. The portions of the act applicable here are as follows:

"Section 1. It shall be the duty of the state treasurer, on the first Monday of June of each year, to designate such banks and trust companies within this state, as he may, under the provisions of

this act, deem eligible to be made state depositories, for the purpose of receiving on deposit funds of this state, and paying out the same on order or checks of the state treasurer."

"Section 3. The state treasurer shall deposit, and at all times keep on deposit in national banks doing business in the State of Oregon, or other banks and trust companies doing business within this state, as shall have been approved under the provisions of this act as herein provided, the amount of money in his hands belonging to the several funds in the state treasury, and any such bank or trust company may file with the state treasurer its application for the privilege of keeping on deposit such funds or some part thereof. All such deposits shall be subject to payment when demanded by the state treasurer on his check, and any bank receiving and holding any such deposit as aforesaid shall be required to pay and shall pay to the state for the privilege of holding the same, interest at the rate prescribed by the state treasurer as hereinafter provided, which rate of interest shall not be less than two per cent per annum. * * *"

"Section 5. For the security of funds so deposited under the provisions of this act, the state treasurer shall require all such depositories to deposit securities of the kind and character hereinafter described, or to give bonds for the payment of such deposits and the interest thereon. Said

bonds, when given, shall run to the State of Oregon, and, together with the securities offered, are to be approved as to the legal form by the attorney general. * * * The bond provided for under this act shall be a surety company bond. * * * (Here follows the form of bond to be given by a surety company.)"

"Section 9. The word 'bonds' wherever used in this act shall be held to include bonds furnished by surety companies authorized and qualified to do business in this state. The word 'security' or 'securities' shall be construed to include United States bonds," etc.

"Section 16. The word 'funds' used in this act shall apply to all funds in the state treasury except the common schools, agricultural college, and university funds. Nothing in this act shall be construed to deprive the state land board of the power to invest or dispose of the funds derived from the sale of public lands as is now or may be provided by law."

Thus it will be seen that the educational funds are excepted from the provisions of Sections 1 to 5, inclusive. But Sections 6, 7 and 8 include the educational fund, and provide as follows:

"Section 6. The state treasurer may designate a bank or trust company in the City of Salem or a bank or trust company in the City of Portland as an active depository for the collection of any drafts,

checks, certificates of deposit and coupons that may be received by him on account of any claim due the state.

"Section 7. The bank or trust company, designated as such active depository, shall be required to give security to the state to be approved by the state treasurer for the prompt collection of all drafts, checks, certificates of deposit, coupons that may be delivered to such active depository by the state treasurer for collection; also, for the safe keeping and prompt payment on the state treasurer's order of all such collections, also for the payment of all drafts that may be issued to said state treasurer by such active depository.

"Section 8. The state treasurer, on receipt of any draft, check, or certificate of deposit, on account of state dues, may place the same in such active depository for collection, and it shall be the duty of such active depository to collect the same without delay, without charge for its services for such collection, or for exchange, and to notify the state treasurer when collected. The compensation to be paid by such active depository shall be fixed by the state treasurer upon the best terms obtainable for the state."

Section 10 contains the following clause:

"The state treasurer shall not be liable personally or upon his official bond for any moneys that may be lost by reason of the failure or insolvency

of any bank which becomes a depository under this act."

The purpose of this statute is to secure to the state interest on state funds, and to provide depositories for state moneys. Of this act Sections 1 to 5 inclusive, relate to the creation of depositories and payment of interest on money deposited, and applies to all state funds other than educational funds, but has no application to them. Sections 6, 7 and 8 provide for active depositories, and apply equally to the general and educational funds. It is evidently not the purpose of these sections that the active depositories shall loan or be required to pay interest on funds deposited thereunder, as Section 5 provides for the security that shall be taken from general depositories, and if the active depositories could loan funds deposited therein, under the provisions of Sections 6, 7 and 8, the effect would be to nullify the requirements of Section 5 as to the character of the security to be given for the general deposits. The writer is unable to understand the purpose of the last clause of Section 8, unless it is to give to the state the benefit of any deal that the treasurer might be able to make for compensation. But whatever the intention, it can not change the meaning of these sections.

Thus it appears that deposits, if they may be called such, in the active depositories, as provided in Section 6, are made for an entirely different purpose than those provided for in Section 3, and

are only for a special purpose, namely, for the collection of the checks and drafts transmitted by the treasurer, the safe keeping and prompt payment of the money upon the treasurer's order. For the security of funds of the general depositories the state treasurer may require securities, such as United States, state, or municipal bonds, described in Section 2, or a bond executed by a surety company, for which a form is prescribed and conditions specified. But as to the security that may be required of an active depository, no specification is made or bond provided for, or other requirement, except that it must be such United States, state, or municipal bonds, specified in Section 9 as shall be approved by the treasurer, and conditioned for the prompt collection of checks and drafts, for the safe keeping of the money collected, and prompt payment thereof, on the treasurer's order. These are very different conditions from those provided by Section 5 for general depositories. It is not in the power of the legislature to make provision for a loan or use of educational funds. Section 5, Article VIII, of the Constitution of Oregon, provides that "the governor, secretary of state, and state treasurer, shall constitute a board of commissioners for the sale of school and university lands, and for investment of funds arising therefrom." In the light of this constitutional provision, we can have no doubt as to the intention of the legislature in excluding educational

funds from the operation of Sections 1 to 5 of the act of 1907. The active depositories hold the money only as collections, and therefore the deposits were special, the title to which did not pass to the bank. Multnomah County v. Oregon National Bank (C. C.), 61 Fed. 912; State ex rel. v Thum, 6 Idaho, 323 (55 Pac. 868); Sexton v. School District No. 34 of Spokane County, 9 Wash. 6 (36 Pac. 1052); Merchants Nat. Bank v. School Dist. No. 8, 94 Fed. 705 (36 C. C. A., 432).

Counsel for defendant cite Baker v. Williams' Banking Co., 42 Or. 213 (70 Pac. 711), as decisive of the rights of the treasurer to make a general deposit of the educational fund, but the question involved here did not arise in that case, and could not, as we are now controlled by the statute of 1907. The character of deposits must be determined by this statute. Section 11 makes it a felony for the treasurer to remove or deposit the state money except for lawful payments "or for the purpose of depositing the same under the provisions of this act" in banks which shall have qualified as depositories, and this manner of deposit is exclusive. Both the treasurer and the Trust Company in June, 1907, recognized and acted under this statute by creating the active depository and segregating the educational funds. Nebraska has a statute similar to Sections 1 to 5 inclusive, of this statute, but it does not except the educational funds, and in State v. Bartley, 39 Neb. 353 (58 N. W. 172;

23 L. R. A. 67), under a constitutional provision similar to ours, it is held that a deposit by the state treasurer in such a depository is a loan, and that the statute is therefore void, in so far as it attempts to include educational funds. And in considering whether a deposit of the educational fund under that law, might not be considered a deposit, for safe keeping, the court, referring to the contention of counsel for plaintiff to that effect, say: "This construction would be a reasonable and proper one, if the deposit contemplated by the statute was a special one, merely for safe keeping, and that the same identical money should be returned. But this is not the kind of deposit the legislature meant." Our statute has gone further, and provided how the educational fund shall be deposited by excepting it from the general deposit authorized by Sections 1 to 5, and providing for the collection of checks and drafts, and the safe keeping of money so collected, subject to the order of the treasurer. This statute constitutes a part of the terms and conditions of the appointment of the depositories, and must be read into any arrangement made thereunder for deposits. State v. Bartley, 39 Neb. 353 (58 N. W. 172; 23 L. R. A. 67, 72); Merchants Nat. Bank v. School Dist. No. 8, 94 Fed. 705 (36 C. C. A. 432), is very much in point upon this question, where it is said: "The bank had knowledge of the nature of the funds, and was chargeable with

knowledge of the statute. * * * The bank undertook to receive the money as a trust fund for an express purpose, and for no other. It is immaterial that in the finding the deposit is designated a 'special deposit.' The true nature of the transaction is disclosed by the facts. The money was to be treated as the funds of the school district, and not as the funds of the bank, and in the light of that understanding, it is clear that the bank had no right to commingle the money with other funds." Also State v. Thum, 6 Idaho, 323 (55 Pac. 858) is in point. It is there provided by statute that a deposit in a bank of state money, otherwise than on special deposit, shall be punished by imprisonment. It is held that this is authority to the treasurer to make special deposits, and that upon such a deposit the bank had no authority to mingle or use the money so deposited.

2. Defendant further urges that the proof shows only a deposit and conversion of checks and drafts, and not money as charged in the indictment, and that this is a variance. The bill of exception shows that the treasurer sent by mail to the Trust Company for collection checks and drafts. When these were paid by the banks on which they were drawn, the Trust Company thereby received the money for the credit of the treasurer, and it is immaterial how they were paid. There is no suggestion in the record that the Trust Company did not receive the money. On the contrary, upon the

receipt of the check "No. 319, Geo. A. Steel, treasurer, upon you, $272,449.02," and check "No. 34, Geo. A. Steel, state treasurer, on Ladd & Tilton, $2,800," the Trust Company opened an account on its books, entitled "Geo. A. Steel, treasurer, educational," and credited that account with a deposit of those amounts—$272,449.02. This is an acknowledgment that it received from itself and from Ladd & Tilton that amount of money for that account upon those checks. And the same is true of every other credit made, and constitutes at least prima facie proof of the receipt of the money. In State v. Neilon, 49 Or. 163 (73 Pac. 321), defendant was prosecuted under this statute for the conversion of state money. The proof was that he received checks and drafts. Mr. Justice Bean, in the opinion, says:

"It is true that the bill of exceptions recites that there is no evidence as to what was done by the defendant with the checks and drafts; but, in the absence of a showing to the contrary, the jury were justified in finding that they were by the defendant converted into money on the presumption that the usual course of business was pursued. Section 738, Subd. 26, B. & C. Comp."

Morse, Banks and Banking, Section 451, says:

"A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of a check. It is the same as if the money had been paid over the

counter on the check, and then immediately paid back again to the account."

This language is quoted with approval in Bartley v. State, 53 Neb. 310, 338 (73 N. W. 744, 752) in a case where a similar question arose; and in Merchants' Nat. Bank v. School Dist. No. 8, 94 Fed. 705 (36 C. C. A., 432) the fund was held to be a trust fund and a special deposit, the title to which remained in the school district, though the deposit was made by checks, and the money not paid over the counter or segregated at the time, but placed to the credit of the district on the books of the bank.

3. When the Trust Company placed to the credit of "Steel, treasurer, educational," the amount of a check, it thereby acknowledged that it had received the amount of the check in money, and is at least prima facie sufficient to establish the receipt of the money by the Trust Company. Having decided that the money in the hands of the Trust Company was a special deposit, and the money remained the property of the State of Oregon, and was paid out to other persons than the state treasurer, it follows that this was a conversion of the money.

4. It is contended, however, by defendant, that the proof does not substantiate the charge in the information that defendants were in the possession of the money of the state, but only that it was

in possession of the Trust Company, and that the officers were not personally liable. But the language of the information is "that the defendants on the 9th day of September, 1907, then and there pretending to act for and on behalf of the Title Guarantee and Trust Company, did then and there have in their possession and under their control, as officers and directors of said Title Guarantee and Trust Company, as aforesaid, $238,426.87." The Trust Company is a corporation, an intangible thing, existing only in contemplation of law, a collection of individuals, authorized to act as if they were one. The individuals are its component parts, and the existence of a corporation independently of its stockholders is a fiction. Its rights and duties are the rights and duties of the persons composing it. 1 Morawetz, Corporation, Sec. 1; 3 Thompson, Corporation, Sec. 4009; 7 Thompson, Corporation, Sec. 8140. Thompson says it has the capacity of acting by the collective vote or will of its component members. It can do no act not authorized by its stockholders or directors, and then only within its charter powers. Its head and hands are the head and hands of its directors and officers, and while it acts lawfully within its corporate powers, the natural and individual capacity and responsibility of its directors and its officers as to all matters respecting the object of the incorporation is totally extinct, and what is done is only by and for the corporation; the directors and

officers are not individually liable for its acts. There may be acts for which the corporation will be held criminally liable, but not in any case in which intent is involved, or where the punishment is more than a fine, because other punishment can not be enforced. However, if the officers and directors of a corporation join in a criminal act, as a corporate act, they are jointly liable with the corporation, if it is an act for which the corporation may be prosecuted; and, if it is a felony, the directors and officers are individually liable. It is their criminal act, and not that of the corporation. 2 Morawetz, Secs. 732, 733; People v. Clark (O. & T.), 14 N. Y. Supp. 642; People v. White Lead Works, 82 Mich. 471 (46 N. W. 735; 9 L. R. A., 722). In the latter case the officers were jointly indicted with the corporation for violation of a municipal ordinance and the Supreme Court say:

"All the defendants were properly convicted. As officers of a company, they were jointly responsible for the business. It is not necessary to the conviction that they should be actually engaged in work upon the premises. The work is carried on by employes. The officers and directors are the persons responsible, and therefore the proper ones to be prosecuted."

To the same effect is State v. Great Works Milling & Man. Co., 20 Me. 41 (37 Am. Dec. 38).

Defendant contends that Section 1807, B. & C. Comp., is only intended to punish persons who are

authorized by law to receive money for the state, or into whose hands it comes lawfully, and who convert it, and that Ross was not individually authorized to receive the money. Under the act of 1907 the Trust Company was made an active depository, and therefore authorized to receive it. This it could only do by the hands of its officers; and, if it was a violation of the statute for the Trust Company to convert the money, it was equally so for anyone who did the act for it, or authorized it. The money came into the hands of these defendants, as officers of the Trust Company, lawfully, by virtue of this statute, and they can not be permitted to say that what they did in violation of the statute was not their act, and that therefore they are not responsible. If the acts were done in the name of the corporation by the defendants, then they were accessories, and aided and abetted, and are principals under Sections 1324, 2153, B. & C. Comp.; 3 Thompson, Corporations, Sec. 4114; 4 Thompson, Corporations, Sec. 4996; 21 Am. & Eng. Enc. Law (2d ed.), 896; State v. Moran, 15 Or. 262 (14 Pac. 419); State v. Steeves, 29 Or. 95 (43 Pac. 947). Thompson, Corporations (Vol 3, Sec. 4014), says:

"It is the duty of the directors and other officers of a corporation to preserve its property as a trust fund of which they are the guardians, and to administer it for the purpose of the trust."

And at Section 4113 he says:

"In a moral sense they are the custodians of the funds committed to their care by the stockholders and the depositors."

These two sections are only discussing their civil responsibility, but it indicates their relation to the funds, and we conclude that the directors and officers of the bank, who used or authorized the use of the money by the Trust Company, are guilty under this statute.

5. Counsel for defendant also urge that the evidence does not tend to establish a conversion of the money by defendant to his own use, namely, that it is not sufficient to show that the funds were converted for the benefit of the Trust Company, but must have been to the personal advantage of defendant. We do not so understand the law of conversion. The statute uses the expression "shall in any way convert to his own use any portion thereof." That is what we understand the term "conversion" to mean, when applied to a wrongful appropriation for which trover will lie, namely, assuming upon one's self the property and right to dispose of another's goods without authority. The cases of Mills v. State, 58 Neb. 263, 271 (78 N. W., 761) and State v. Foust, 114 N. C. 842 (19 S. E., 275) cited by defendant as making a distinction between conversion to one's own use and to the use of another, both intimate that the term quoted may not include a misappropriation. But the Ne-

braska statute includes both forms of expression "convert to his own use or to the use of another." Therefore, it might be held that the legislature meant to limit the meaning of the former. But both of these cases are decided upon the term "embezzled," and not upon the expression "convert to his own use." The opinions in some civil cases, in defining what constitutes conversion say that it is not necessary that the conversion be to the use of the converter. But the term "conversion," as used in law courts, means "conversion to one's own use." Johnson's Universal Cyc. says conversion in law has two meanings. "(2) In the law courts * * * conversion lies at the foundation of the common-law action of trover, which word is derived from the French word 'trover,' to find. There is a legal fiction that the defendant found the plaintiff's property and converted it to his own use. The material part of the case is the conversion." 1 Chitty, Pleading, 145, says: "The action of trover or conversion was, in its origin, an action of trespass on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use." Lord Mansfield says: "In form it (trover) is a fiction; in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use." 1 Chitty, Pld., 146. In 3 Esc. Laws of Eng., 330, the same language is used in defin-

ing the origin and meaning of the term "conversion," namely, as conversion to one's own use and the averment of "finding," being only a fiction, has been dropped, and the action is now known as "conversion."

We find no decision or text book, nor is any cited by defendant, that attempts to define the meaning of the term "convert to his own use" when used in a criminal statute. Such conversion does not, in itself, constitute a crime. The definitions in the dictionaries and text books relate to acts that constitute a conversion for which trover will lie. A conversion, in the ordinary sense of the word, may be accomplished by one lawfully in possession of goods of another, when the conversion is by authority and for the benefit of the owner, and this creates no liability. But when used in its legal sense, the conversion must be for one's own use. In Baldwin v. Cole, 6 Mod. *212, Lord Holt says:

"What is a conversion but an assuming upon one's self the property and right of disposing of another's goods, and he that takes upon himself to detain another man's goods from him, without cause, takes upon himself the right of disposing of them."

"An appropriation of, and dealing with, the property of another as if it were one's own, without right." Webster. Under the heading, "Appropriation to convertor's use" (2 Words and Phrases,

1564) it is said: "Any direct act of dominion, wrongfully exercised over one's property in denial of his right or inconsistent with it, is a conversion" —citing many authorities. See 9 Bacon's Abr. 631. To the same effect is the definition given by Mr. Justice Lord in the opinion in Budd v. Multnomah St. Ry. Co., 12 Or. 271 (7 Pac. 99: 53 Am. Rep. 355.) Fowler v. Hollins, 41 L. J. (1872) 277, is a leading English case on this subject, and the court, in the opinion, uses the word "convert" as the equivalent of "convert to his own use." See, also, a leading article in 13 Cent. Law J. 185, copied from Solicitor's Journal, London. West Jersey R. R. Co. v. Trenton Car Works Co., 32 N.J.L., 517. The term "convert to his own use" is not descriptive of crime, but is used in criminal statutes as a legal term with a definite meaning, well understood, and is equivalent to the legal term "conversion," and this is the "conversion to his own use" of our criminal statute, which declares that such a conversion of state money, by one who has received it for the state, shall constitute larceny.

We have six criminal statutes that make conversion of personal property of another "to one's own use" a crime; and, if it be necessary for the state to prove that the conversion is for the personal advantage of the defendant, there would be a failure of justice in many cases. Every assuming by one person to dispose of the goods of another, without right, as if they were his own is a conversion to

one's own use. This is not extending the statute by inference or construction, but giving to the words the technical meaning they bear in the law. Laverty v. Snethen, 68 N. Y. 522 (23 Am. Rep. 184), makes the distinction between conversion to the use of the owner and to one's own use, and says:

"Trover may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. * * * If the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion."

We understand from these authorities, and many others we have examined, that, in relation to trover, the term "conversion" necessarily means conversion to one's own use, and is fully accomplished by any exercise of a dominion over a chattel without the authority of the owner, whereby the true owner is deprived of the enjoyment of his chattel. And it is wholly immaterial whether the person so converting did it for his own personal advantage or not. See also State v. Omaha Nat. Bank, 59 Neb. 483 (81 N. W. 319).

6. One other question remains: Does the evidence tend to show that Ross, as a director or president, participated in, or was a party to, the conversion? "Officers, directors, and agents of a cor-

poration, participating in a violation of law in the conduct of the company's business may be held criminally liable therefor." 21 Am. & Eng. Enc. Law (2d ed.) 896. We think there can be no question of the correctness of this statement. It is equally true that an officer of a corporation is not criminally liable for the unlawful act of the corporation unless he participated in the wrongful act. In Rex v. Hayr, 14 Ont. L. R. 201, it is said that, "in the absence of a statute to the contrary, an officer of a corporation can not be punished criminally for the corporation's unlawful act or default, unless he participates therein as an aider, abettor, or accessory, even though the corporation's defense consist of the violation of a statute which imposes imprisonment as a penalty." There is a note to this case in 8 Am. & Eng. Ann. Cas. 883, in which the author says: "The question of the criminal liability of the officers of a corporation for its acts of nonfeasance seems seldom to have arisen. The weight of modern authority * * * is apparently as laid down in the reported case, viz., that an officer of a corporation is not liable for an offense committed by the corporation, except where he has in some way participated in the illegal act as an aider, abettor, or accessory"—citing several cases to that effect. 3 Thompson, Corporations, Sec. 4134, citing People v. Clark (O. & T.), 14 N. Y. Supp. 942, is to the same effect. There is no evidence in this transcript tending to show that

Ross actually paid out for the Trust Company any of its money, or expressly authorized any one to do so. There is no doubt that if the money had been embezzled from the Trust Company, or applied in any way not intended by the company, or not for its benefit, by any subordinate, then Ross could not be held criminally liable, unless he participated in such diversion thereof, but that is not the case. The record tends to show that the money was in the general deposit funds of the Trust Company, and was paid out in the usual way in payment of legitimate claims against the Trust Company; that is, in the manner contemplated and intended by the company, and those in direction of its affairs. The agents actually paying out the money had a right to understand that this was to be done; there being no segregation of the money or limitation on the use of it. The Trust Company could only become an active depository of this fund by authority of its officers and board of directors. When the money was received by the company as an active depository, and its directors and officers permitted the money to become a part of the general deposit of the company, without restriction thereon, with knowledge that in so doing the money would be applied to the Trust Company's general uses, this was general authority to subordinates to pay it out in the usual course of the business, and these officers and directors are liable therefor. The evidence tends to show that the dis-

position of the money by the Trust Company was with their knowledge, consent, and acquiescence, and they thereby participated in its diversion. To this effect is 4 Thompson, Corporations, Sec. 4996.

This disposes of the principal questions involved. There are some minor questions raised, namely:

7. Exception was taken to the admission of evidence relating to Ross' knowledge of the bill pending before the legislature of 1907, which authorized the appointment of depositories. This evidence only tended to establish Ross' knowledge of the statute and its terms, and was not prejudicial.

8. Exception was taken to the admission in evidence of the demand made upon the Trust Company. This we think was competent and consistent with the charge in the information that defendants had the money in their control as officers and directors of the Trust Company, and a demand upon the Trust Company for which the defendants were acting was sufficient.

9. However, a demand, in case of conversion, is only necessary in case the conversion is not otherwise made to appear. Here the conversion was disclosed by proof that the money was paid out on liabilities of the Trust Company.

10. The proof offered by defendant to show absence of criminal intent was immaterial, as it only tended to show that, after the money was con-

verted, the Trust Company gave the treasurer collateral security. Such security is contemplated in the act of 1907, and when given did not condone the wrongful act.

11. The proof of loss through failure of the Oregon Trust and Savings Bank was incompetent, as the money—being a special deposit—should not have been involved in the dealings between the Trust Company and its creditors.

12. Neither is criminal intent involved under this statute, as we have shown in defining a conversion. Such a conversion, when committed in violation of the terms of this statute (Section 1807), constitutes the offense, and no other intent need be shown.

13. Exception was also taken to remarks made by the district attorney and the judge, in presence of the jury, in permitting leading questions by the state to its own witness. When the district attorney was cautioned by the court not to cross-examine his own witness, he appealed to the court as follows: "I must invoke the rule in this case that the witness is an unwilling one"—to which the court replied: "I see that the witness is unwilling." Certainly the district attorney had a right to make such an appeal to the court if the conduct of the witness justified it, and any form of ruling by the court allowing the attorney's question would have meant the same to the jury, as the language used, and was not error.

14. Exception is also taken to the portion of the judgment that commits defendant to the county jail until the fine is paid, for the reason that the same is cruel and unusual under the prohibition in the constitution. Defendant was sentenced to five years in the pentientiary, to pay a fine of $576,853.74, and to be imprisoned in the county jail one day for every $2 of the fine, not exceeding 288,426 days. This is an unusually large fine, and the imprisonment is for life, for the non-payment of the fine, and is a cruel and unusual punishment within the prohibition of the constitution. State v. Miller, 75 N. C. 73; State v. Driver, 78 N. C. 423; Frese v. State, 23 Fla. 267 (2 South. 1); in re Yell, 107 Mich. 228 (65 N. W. 97); Southern Express Co. v. Walker, 92 Va. 59 (22 S. E. 809: 41 L. R. A. 436); State v. Whitaker, 48 La. Ann. 527 (19 South. 457; 35 L. R. A. 561).

15. There can be no question that a sentence may be excessive, even though within the maximum of the statute, but if excessive, it is within the power of the appellate court to enforce this provision of the bill of rights, and avoid the judgment so far as it is excessive. Mims v. State, 26 Minn. 494 (5 N. W. 369); Southern Express Co. v. Walker, 92 Va. 59 (22 S. E. 809; 41 L. R. A. 436); Frese v. State, 23 Fla. 267 (2 South. 1); State v. Butman, 15 La. Ann. 166. And the judgment and sentence of the lower court will be modified by reversing that part directing that "he be imprisoned

in the county jail of Multnomah County, Oregon, until said fine is paid, not exceeding 288,426 days." In all other respects the judgment is affirmed.

Modified: Affirmed.

ON MOTION FOR REHEARING.

Mr. Justice Eakin delivered the opinion of the court.

Mr. Justice King dissenting.

16. A petition for rehearing has been filed in this case by counsel for defendant, another by Carey & Kerr, on the ground that they are employed in cases involving some of the same questions, and another by Joseph Simon and twenty other leading members of the bar, solely as amicus curiae, on account of the public importance of the decision. The ground upon which the motion is based is error of this court in the application of the law to this case as disclosed in the opinion, and is principally a review of the questions discussed therein.

Counsel for defendant and Carey & Kerr insist that the act of 1907 (Laws 1907, p. 248) has no application to the educational fund, and that the treasurer has the right to make general deposits of that fund in any bank, as held in Baker v. Williams, 42 Ore. 223 (70 Pac. 711), independent of that act, while it is contended in the petition of Joseph Simon et al., that by Sections 6, 7 and 8 of the late law a general deposit of that fund in the

active depository is authorized. We have re-examined the questions involved with the aid of the briefs submitted with these applications, and adhere to our first views. Sections 1 to 5 make provision for deposits, clearly contemplating that the deposits shall be general, and requiring the treasurer to deposit all state funds, except the educational fund, in the general depositories. The collections made by the active depository upon checks and drafts for the general funds cannot be left there by the treasurer, but must be transferred to the general depositories. This obligation is as binding on him as that he shall not retain the money in his office. Instead of exempting the educational funds from the terms of the act, Section 10 provides that the term "funds," as used in the act, shall not include the educational funds, and that nothing in the act shall be construed to deprive the state land board of power over this fund, thus indicating that it is to be governed by the provisions of the act, save where it is excepted therefrom, and Sections 6, 7 and 8 seem to have special reference to the educational fund. The decision in Baker v. Williams, 42 Ore. 223 (70 Pac. 711) is not here questioned. No doubt the legislature had that decision in mind when it adopted the present law, seeking thereby to guard the educational fund by expressly excluding it from a general deposit. Section 6 is not uncertain as to what funds may be collected thereunder when it says that it is for the collection of

any drafts, checks, and certificates that may be received by the treasurer "on account of any claim due the state." Secs. 3 and 4 fix the minimum rate of interest to be paid by the general depositories, and provide that the rate agreed upon shall not be changed for a year, and shall be computed on daily balance and paid quarterly, and that the bank shall render an account the first of every month, showing daily balances. And the condition of the security given is that all of these things shall be done, while the security required under Section 7 is conditioned only for the prompt collection, the safe keeping, and the prompt payment on the treasurer's orders of the proceeds of such collections and for the prompt payment of its own drafts. This does not include statements, nor contemplate interest. The conclusion is unavoidable that this act only contemplates general deposits of funds other than the educational, and for which interest shall be paid. It was evidently the purpose of the legislature by these provisions to take the educational fund out of that custom or right of the treasurer to make general deposits as recognized in Baker v. Williams, 42 Ore. 223 (70 Pac. 711). The clause in Section 8, to the effect that the compensation to be paid shall be fixed by the treasurer, does not require him to exact a compensation as a condition for the deposit nor is such requirement made a condition upon which the bank shall be appointed an active depository. In the opinion we cited some cases holding

that in case of a special deposit the money may not be mingled by the bank with its own funds, yet we did not intend to decide that question, deeming it unnecessary since the conversion was proved independent of such commingling; but the fact that the bank does so mingle a special deposit can not deprive the owner of his rights as such. Woodhouse v. Crandall, 197 Ill. 104 (64 N. E. 292; 58 L. R. A. 385). It is not held in the opinion that the trust company or the defendants were officers of the state, but the act of 1907 authorizes their possession of state money for the state, and they come fully within the class of persons mentioned in Section 1807, B. & C. Comp., which includes more than state or municipal officers, viz., "any person who shall receive any money whatever for this state." When the treasurer deposits the money, as directed by the act of 1907, his personal liability therefor is terminated, although it is still subject to his disposal. The depository does not receive the money for him, but for the state; that is, by express direction of the law and not at the option of the treasurer. The Trust Company and defendants did receive this money for the state by special authorization, and are as clearly within the very words of the statute as the treasurer would be.

17. Section 1805, B. & C. Comp., defining embezzlement, relates to the fraudulent conversion by an officer, agent, or clerk of a private person or incorporation, and does not apply to one in possession

of public money, and Section 1807 relates especially to public moneys that are misappropriated. This is not a case where some other officer converted the money and defendant is held responsible for that act by reason of his relation to the bank. There is nothing in the record to disclose that any other officer wrongfully converted the money. The cashier or teller who paid out the money was not offender, unless he was aware of the source from which the money came and the capacity in which it was held. The wrongful act was done by the officers and directors who made the arrangement to receive the special deposit and permitted it to be mingled with its general deposit without restriction upon its use. A depository is only created upon the bank's application in writing, accompanied by a sworn statement of the condition of the bank, which must be approved by the treasurer. This can only be consummated through the board of directors. It is a contract between the state and the bank of which the statute is a part to the effect, among other things, that the educational fund is a special deposit, and mingling it with its general funds without restriction is the wrongful act that resulted in the conversion. Judge Redfield in a note to the case of United Society of Shakers v. Underwood, 13 Am. Law Reg. (N. S.) 211, in which he criticises that decision, states the liability of the bank and its officers in case of a special deposit, and says:

"But, as said in Foster v. Exeter Bank, supra (37 Mass. 479; 9 Am. Dec. 103), it would be a breach of trust for the bank or any of its officers to open a package left on special deposit, and whoever did or committed such act would be responsible to the owner for such tort. And, if done by an officer of the bank for its use and benefit, there can be no doubt the bank would be responsible. * * * The books all show that such officers and servants are liable to the owner of such special deposits for their own wilful acts."

Such acts, resulting in the diversion of the money, constitute the conversion.

18. Defendant now, for the first time, questions the sufficiency of the indictment, in that it does not allege that the Trust Company was an active depository or that it sustained any official relation to the state. The allegation is in effect that the defendants, acting for the Trust Company, did then and there have in their possession $238,426.87 which belonged to the State of Oregon, and was part of the educational funds of the state, deposited for the state for safe keeping, to be returned by defendants to the State of Oregon. The general rule is that, when the statute sets out what acts shall constitute the offense, it is generally sufficient in the indictment to charge the offense in the substantial words of the statute. This rule has its exception, which is, that the elements of the

crime sufficient to inform the defendant of the charge he is called upon to answer should be set out. As defined in State v. Dougherty, 4 Ore. 305, the indictment is sufficient if it contains such specification of acts and descriptive circumstances as will upon its face fix and determine the identity of the offense, and enable the court by an inspection of the record alone to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law. The indictment, we think, fully complies with this requirement. There is nothing left doubtful as to the particular acts constituting the offense. It states that the money was part of the educational fund of the state placed in defendant's possession for the state for safe keeping, which shows a lawful possession and comes within the words of the statute. State v. Lee, 17 Ore. 488 (21 Pac. 456); State v. Sam, 14 Ore. 347 (13 Pac. 309).

10. Defendant's counsel contend that the charge against defendant was made by information filed March 6, 1906, and not by indictment, and that by the amendment of Section 12, Article VII, Constitution of Oregon, at the June, 1906, election it is provided that no person shall be charged in any circuit court with the commission of any crime except upon indictment found by a grand jury; that such amendment operated to repeal Sections 1263 to 1264, which provide for trial upon information by the district attorney, and there being no saving

dance in the amendment to the constitution the Appellate Court is by the amendment divested of jurisdiction. This question was before this court in State v. Jurgens, 56 Ore. 1 (98 Pac. 813), in which it is held that the constitutional amendment is only prospective and does not apply to pending cases, and we adhere to that view. If, as contended by defendant, the provisions of Sections 11 and 12 of the act of 1907 operate to repeal Section 1807, B. & C. Comp., so far as there is a conflict as to the penalty, yet they only relate to acts of the treasurer and not to the depository, and Section 1807 is unaffected thereby so far as it relates to the offense charged in this information.

20. Counsel again call our attention to the excessiveness of the fine, viz., $576,853.74, and upon further consideration we believe that the fine is excessive within the contemplation of the constitutional provision quoted in the opinion. The fine and the imprisonment for non-payment thereof, adjudicated by the trial court, were within the terms of the statute and in compliance with its direct command, but we are of the opinion that, the fine being so great, it is apparently beyond the power of the defendant to pay it at this time or even during a lifetime of effort, and is such a one as is inhibited by the Constitution.

The judgment of the lower court will be modified by reversing that part thereof adjudging that

defendant pay a fine of $676,853.74, and that he be imprisoned in the county jail of Multnomah County, Oregon, until said fine is paid, not exceeding 288,426 days. In all other respects the judgment is affirmed.

Modified on rehearing. Affirmed.

Mr. Justice King delivered the following dissenting opinion:

I concur in the holding by the majority respecting the unconstitutionality of the fine and jail sentence imposed; but after a careful re-examination of the able briefs and argument therein of the respective counsel, including those on petition for rehearing, I am unable to agree with the conclusion announced respecting the other, and decisive, points presented. I accordingly record my dissent therefrom.

STATEMENT OF FACTS.

The plaintiff in error was charged by information filed by the district attorney of Multnomah County on March 6, 1908, with the crime of larceny committed in Multnomah County, Oregon, by converting to his own use $288,426.87, a part of the educational funds of the State of Oregon.

The substance of the charge was that on the 9th of September, 1907, the Title Guarantee and Trust Company (hereafter referred to as the Trust Company) was a corporation carrying on a banking business, of which the plaintiff in error was presi-

dent and one of the directors, and that on that date plaintiff in error and other directors and officers of the Trust Company had in their possession and control for safe keeping as officers and directors of the Trust Company $268,426.87 belonging to the State of Oregon and being a part of the irreducible school fund, the agricultural college fund and the university fund (hereafter referred to as the educational fund); that plaintiff in error, well knowing that such money belonged to that fund, did then and there wilfully, unlawfully and feloniously convert the same to his own use, which money prior to that date the plaintiff in error, as an officer of the Trust Company, together with other officers of the company, had received for the state for safe keeping from George A. Steel as state treasurer.

On the 14th day of January, 1907, George A. Steel took the office of state treasurer of the State of Oregon, and at that time had $35,000 deposited with the Trust Company subject to his check, which money belonged to the State of Oregon. At that time there was no segregation of the funds of the treasury as between the educational and general funds except on the books of the treasurer, and the Trust Company had not been notified as to which fund the deposit belonged. That on the 3d day of June, 1907, the Trust Company was designated by the state treasurer as an active depository of the state, under the provisions of Section 6 of an act of the Legislative Assembly of the State of Oregon

adopted in the year 1907, providing for state depositories for state funds (Laws 1907, p. 249), at which time the state treasurer segregated the funds and wrote to the Trust Company as follows:

"State of Oregon, Treasury Department,
Salem, June 3, 1907.

The Title Guarantee and Trust Company, Portland, Oregon:

Gentlemen—I inclose herewith for credit of Geo. A. Steel, state treasurer, educational, the following checks:

No. 319, Geo. A. Steel, state treasurer, on you	$272,449.02
No. 34, Geo. A. Steel, state treasurer, on Ladd & Tilton	2,600.00
Total	$275,049.02

Yours very truly,
GEO. A. STEEL,
State Treasurer."

Thereupon on the 5th day of June, 1907, an account was opened on the books of the Trust Company, entitled "George A. Steel, treasurer, educational," and on November 6, 1907, the balance to the credit of that account was $288,426.87. Until the 20th day of August, 1907, the Trust Company always had on hand cash exceeding the balance due

from it on the educational account. On November 8, 1907, the Trust Company's cash on hand lacked $274,999.73 of being equal to the balance due on said account, and on that date all its cash was turned over to the receiver. A written demand was made by the state treasurer on the Trust Company for the amount of such account on November 12, 1907, service of which was accepted for the Trust Company by plaintiff-in-error Ross as president.

The trial resulted in a verdict against the plaintiff in error of guilty and a finding by the jury that the amount of money converted was $288,426.87. Thereupon judgment was rendered against plaintiff in error that he be imprisoned in the penitentiary of the State of Oregon for the term of five years; that he be adjudged to pay a fine in the sum of $576,853.74, and that in default of the payment of the fine he be imprisoned in the county jail of Multnomah County one day for each two dollars of the fine, not exceeding 288,426 days, and that the state recover of and from the plaintiff in error its costs and disbursements. From this judgment and sentence plaintiff in error appealed to the Supreme Court of Oregon, which is the highest court of said state, which court affirmed the judgment of conviction but modified the sentence by annulling all of it except the five years' imprisonment in the state penitentiary.

Pending the appeal of plaintiff in error to the Supreme Court of Oregon an amendment to the

Constitution was adopted and became effective, which took away the power of district attorneys to file informations, and provided that no person should be charged in any Circuit Court with the commission of a crime except upon indictment found by a grand jury. After the said appeal was decided by the Supreme Court of Oregon plaintiff in error filed with said court a petition for a rehearing, in which for the first time he contended that the said constitutional amendment divested the court of jurisdiction to proceed further in his cause, and that the enforcement of the sentence against him would deprive him of his liberty without due process of law, and he invoked the fourteenth amendment for his protection, and raised the question as a federal question, which is the only federal question that the plaintiff in error presented to the Supreme Court of Oregon. Upon this question the Supreme Court of Oregon ruled that the constitutional amendment operated prospectively and not retrospectively, and that it did not affect pending causes but applied only to accusations made subsequent to the taking effect of the amendment.

State of Oregon, County of Multnomah, ss.

I, Martin L. Pipes, being first duly sworn, depose and say that I am one of counsel of defendant in error; that I prepared the foregoing statement

of facts, and that the same is true, as I verily believe.

(Signed) Martin L. Pipe

Subscribed and sworn to before me this 2.1. day of June, 1912.

(Signed) A. M. Cannon,

Clerk United States District Court
District of Oregon
Notary Public for Oregon.

In presenting our argument upon this motion we rely upon the following propositions of law:

I.

The Supreme Court has no jurisdiction to review the decision of a state court except upon a federal question specially set up or claimed in the state court.

Mutual Insurance Co. of New York v. McGrew, 188 U. S. 291.

Michigan Sugar Co. v. Dix, 185 U. S. 112 (43 L. Ed. 829).

F. G. Oxley Stave Co. v. Butler Co., 166 U. S. 648 (41 L. Ed. 1149).

II.

The construction given to a statute or constitution of the state by the highest court of such state is regarded as part of the statute or constitution,

and is as binding as the text upon the Supreme Court of the United States.

Leffingwell v. Warren, 2 Black 595 (17 L. Ed. 261).

Russell v. Ely, 2 Black 575 (17 L. Ed. 258).

Oaks v. Mace, 165 U. S. 363 (41 L. Ed. 746).

Stone v. Wisconsin, 94 U. S. 181 (24 L. Ed. 102).

Sumner v. Hicks, 2 Black 352 (17 L. Ed. 355).

Adams v. Nashville, 95 U. S. 19 (24 L. Ed. 369).

Nobles v. Georgia, 168 U. S. 398 (42 L. Ed. 515).

New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431 (39 L. Ed. 1042).

Baltimore Traction Co. v. Baltimore Belt R. Co., 151 U. S. 137 (38 L. Ed. 102).

Olcott v. Fond du Lac Co., 16 Wall. 678 (21 L. Ed. 382).

Missouri, K. & T. R. Co. v. McCann, 174 U. S. 586 (43 L. Ed. 1096).

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28 (44 L. Ed. 657).

Tullis v. Lake Erie & Western R. Co., 175 U. S. 348 (44 L. Ed. 192).

Iacardi v. Alabama, 19 Wall. 626 (22 L. Ed. 215).

Fairfield v. Gallatin Co., 100 U. S. 47 (25 L. Ed. 544).

Morley v. Lake Shore & Michigan Southern R. Co. 146 U. S. 162 (36 L. Ed. 925).

Louisiana v. Pillsbury, 105 U. S. 294 (26 L. Ed. 1035).

III.

The construction of the state court that a statute under which a person has been convicted is prospective only will be followed in the federal court on the question whether or not the statute is an ex post facto law.

Jaehne v. New York, 128 U. S. 190.

In re Jaehne, 35 Fed. Rep. 367.

IV.

An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed.

Calder v. Bull, 3 Dall. 386 (1 L. Ed. 648).

Mallet v. North Carolina, 181 U. S. 590.

V.

The constitutional provision against ex post facto laws applies only to criminal or penal statutes.

Ogden v. Sanders, 12 Wheat. 213 (6 L. Ed. 606).

League v. Texas, 184 U. S. 161 (46 L. Ed. 481).

Calder v. Bull, supra.

Locke v. New Orleans, 4 Wall. 172 (18 L. Ed. 334).

VI.

The constitutional provision that no state shall pass an ex post facto law refers to a legislative enactment and not to a judicial decision.

See cases under Proposition VII.

VII.

A contract can only be impaired within the meaning of the United States Constitution so as to give this court jurisdiction on writ of error to a state court by some subsequent statute of the state which has been upheld or given effect by the state court.

Bacon v. State of Texas, 163 U. S. 207 (41 L. Ed. 133).

New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 118 (31 L. Ed. 607).

Central Land Co. v. Laidley, 159 U. S. 103-109 (40 L. Ed. 91-93).

Turner v. Board of Commissioners of Wilkes County, 173 U. S. 461 (43 L. Ed. 768).

VIII.

The federal Supreme Court will not hold a state statute void on the ground that it impairs the obligation of contracts unless it impairs the obligation of the particular contract which is involved in the controversy.

Lehigh Water Co. v. Easton, 121 U. S. 388 (30 L. Ed. 1059).

For convenience we will hereafter refer to the act of the legislature of Oregon taking effect May 26, 1907, being Chapter 185 of the Laws of 1907, page 248, as the depository law.

No Federal Question.

Calling the court's attention to our first proposition, that a federal question, to be availed of in this court, must have first been specially set up or claimed in the state court, this record will show that only one federal question was raised in the

state court, and that it was raised for the first time upon a petition for a rehearing, and that is the question of due process of law. The question was not properly raised under the rules laid down by this court as to when and how a federal question should be raised, but the Supreme Court of Oregon entertained and decided it, and that is sufficient to give this court the right to consider it. The other federal questions, namely, the question of the ex post facto law and the law impairing the obligation of a contract, were not specially set up or claimed in the state court, but were raised for the first time in the petition for writ of error in this court. For the purpose of showing that a federal question can not be raised in such a manner we quote from the case of Mutual Insurance Company of New York v. McGrew, cited above, briefly:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in Section 709 U. S. Comp. Stat., p. 575, and it is thoroughly settled that in order to maintain it the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not review the judgment of the court below on questions not therein raised. The proper way is by pleading, motion, exception or other action, part, or being

made part, of the record, showing that the claim was presented to the court. It is not properly made when made for the first time in a petition for rehearing after judgment, or in the petition for writ of error, or in the briefs of counsel not made part of the record. If the highest court of a state entertains a petition for rehearing which raises federal questions and decides them that will be sufficient."

In view of this law we claim that the Supreme Court of the United States is precluded from considering the second and third assignments of error.

The fourth assignment of error relates to a ruling of the court in excluding certain testimony. This clearly is not a federal question, and therefore need not be discussed upon this motion.

The fifth assignment of error is simply a conclusion from the other assignments, and would necessarily depend upon the other errors assigned.

So then, as we view the case, the first assignment of error is the only one that can be considered by this court. We will, however, show that the second and third assignments cannot be maintained even if they had been properly raised.

Assignment No. 1—Due Process of Law.

Confining our attention now to the first assignment, the plaintiff in error contends that he was deprived of his liberty without due process of law, for the reason that while his case was pending on appeal before the Supreme Court of Oregon an

amendment to Section 18 of Article VII of the Constitution of the State of Oregon became effective, which he claims repealed the law authorizing district attorneys to file informations and provided that subsequent to the taking effect of the amendment no person should be charged in the Circuit Court except upon an indictment found by a grand jury; that plaintiff in error was tried upon an information filed by the district attorney, and that his prosecution could not be maintained after the amendment took effect, for the reason that he was not being tried upon an indictment found by a grand jury, and the law authorizing the information under which he was being prosecuted was no longer in effect; that the change in the law brought about by the amendment was not merely a change in procedure, of which he could not complain, but went to the jurisdiction of the court and deprived the court of jurisdiction to proceed further in his cause. We do not deem it necessary to discuss whether such change was jurisdictional or not, or was a mere matter of procedure, or whether it operated as a repeal of the law under which plaintiff in error was prosecuted, for the reason that the Supreme Court of the State of Oregon in the case of State v. Ju Nun, above quoted in full, decided that the amendment did not repeal or change the law under which the defendant was tried and convicted, nor make that a criminal act which was innocent when committed, or change the punishment or alter

the rules of evidence, or in any other manner affect any substantial right of the defendant, and that the amendment was a mere change in the procedure, and was prospective and not retrospective, and did not affect pending cases. In other words, the Supreme Court wrote into the amendment by construction a saving clause, the effect of which is exactly the same as if the amendment had specifically excepted from its operation all pending cases. The Ju Nun case was cited, applied and adhered to by the Supreme Court of Oregon in its decision affirming the conviction of plaintiff in error. So that we have two decisions by the highest court of Oregon construing the said amendment and holding that it operates prospectively and can apply only to charges made after the taking effect of the amendment. Under the authorities cited this court is bound to adopt the interpretation of the amendment given by the Supreme Court of Oregon.

In the case Jaehne v. New York, 128 U. S. 190, this court held that it was bound by the decision of the highest court of New York holding that a statute was prospective only.

In Leffingwell v. Warren, 2 Black 595, this court, speaking through Mr. Justice Swayne, said:

"The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of the state adopt

new views as to the proper construction of such a statute and reverse its former decisions this court will follow the latest settled adjudication."

In the case of Oakes v. Mace, 165 U. S. 363, Mr. Justice White delivered the opinion of the court and decided that the ruling of the court of last resort of the State of Montana interpreting the constitution and laws of that state was binding in this court.

In the case of Stone v. State of Wisconsin, 94 U. S. 181, it was held by this court that the construction of the statute and constitution by the Supreme Court of Wisconsin was binding upon the Supreme Court of the United States as a question of statutory and constitutional law.

In Adams v. Nashville, 95 U. S. 19, this Supreme Court decided as follows:

"The Supreme Court of Tennessee hold in the case before us that this statute repeals and overrides the ordinance of exemption, and brings these bonds within the scope of general taxation. This is a decision of a state tribunal upon the construction of its own statutes, which we are bound to respect."

In the case of New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, Mr. Justice Shiras delivered the opinion of the court and said:

"A construction or meaning attributed to the terms of a state statute by the courts of such state

will, of course, be adopted by this court when called upon to decide questions arising under such legislation."

In the case of Olcott v. Fond du Lac Co., 16 Wall. 678, this court, speaking through Mr. Justice Strong, said:

"It is undoubtedly true in general that this court does follow the decisions of the highest courts of the states respecting local questions peculiar to themselves or respecting the construction of their own constitutions and laws, but it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state which the federal courts adopt as rules for their own judgments."

In the case of Missouri, K. & T. R. Co. v. McCann and Smizer, 174 U. S. 586, the present chief justice delivered the opinion of the court, from which the following is a quotation:

"The reasoning now relied on, then, is that although the Supreme Court of the State of Missouri has interpreted the statute of that state as not depriving a carrier of power, on receiving an interstate shipment, to limit its liability to its own line, that this court should disregard the interpretation given to the state statute by the court of last resort of the state and hold that the statute means the very contrary of its import as declared by the Su-

preme Court of the state, and upon this construction decide that the state law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof."

In the case of Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, Mr. Justice McKenna delivered the opinion of the court. We quote from the opinion the following:

"The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statutes of that state mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts."

In the case of Tullis v. Lake Erie & Western R. Co., 175 U. S. 348, Chief Justice Fuller delivered the opinion of the court, from which we quote the following:

"As remarked in Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580-6 (43 L. Ed. 1093-6; 19 Sup. Ct. Rep. 755), the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort of the state, and by an adverse construction to decide that the state law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof."

In the case of Morley v. Lake Shore & Michigan Southern R. Co., 146 U. S. 162, the opinion was delivered by Mr. Justice Shiras. We quote from it at some length:

"The first question we have to consider is the effect to be given to the saving clause contained in the first section of the act of June 20, 1879, which provides that nothing therein contained shall be so construed as to in any way affect any contract or obligation made before the passage of that act. This question is answered for us by the decision of the Court of Appeals of New York in this very case, holding that this saving clause is not applicable in the case of a judgment like the plaintiff's. In Louisiana v. Pillsbury, 105 U. S. 294, this court, speaking by Mr. Justice Field, says: 'Whether such a construction (by judicial decisions upon a clause of the state constitution) was a sound one is not an open question. * * * The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. * * * The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two states, expressed in the same terms, is construed differently by the highest courts they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all

cases arising under it. The rule of construction adopted by the highest courts of the state, in construing their own constitution and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court.' Provident Institution for Saving of Boston v. Massachusetts, 73 U. S., 6 Wall. 611, 630. 'The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.' Leffingwell v. Warren, 67 U. S., 2 Black 599, 603. The meaning of a state statute, declared by the highest court of a state, is conclusive upon this court. Randall v. Brigham, 74 U. S., 7 Wall. 523, 541. If, then, the law is enacted by the legislature and construed by the state judiciary will be the law of the state it follows that as to the proper construction of the statute and as to what should be regarded as among its terms no federal question could arise. The most that could be claimed would be that although the statute of the state was unobjectionable, yet the state court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law; which latter question alone is, by the plainest possible terms of the constitution and judiciary act, subject to investigation here. Assuming, then, that

the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself as construed by the state court. Did, then, the law that changed the rate of interest thereafter to accrue on a subsisting judgment infringe a contract within the meaning of the Constitution of the United States?"

The case of Fairfield v. Gallatin Co., 100 U. S. 47, shows how far this court will go in upholding the rule we contend for. It appears from that case that this court had construed a section of the Constitution of Illinois without being aware that the same section had been differently construed by the Supreme Court of that state. The question was again brought before this court and it reversed its former holding on the ground that it was bound by the construction given by the state court. Mr. Justice Strong in delivering the opinion, among other things said:

"In Concord v. Bk., 92 U. S. 625, we had occasion to construe this section of the state constitution. We then held that donations by counties or other municipalities to railroad companies were prohibited by it and that they could not be lawfully made after July 2, 1870, though they had been authorized by prior statute and by a vote of the people of the county or municipality before the adoption of the constitution. We were fully aware that it is the peculiar province of the Supreme Court of a state to interpret its organic law, as well as

its statutes, and that it is the duty as well as the pleasure of this court to follow and adopt that court's interpretation. But we were not informed when the case was decided that any judicial construction had been given to the constitutional provision. It now appears that the Supreme Court of Illinois had previously considered it and decided that donations, equally with subscriptions, if sanctioned by a popular vote before the adoption of the constitution, are not prohibited by it, and that they are excepted from the prohibition by the proviso. This was decided by that court in 1874, more than a year before Concord v. Bk. came before us, but the decision was not called to our notice, and it was not reported until 1877. It may now be found in R. R. Co. v. Pinckney, 74 Ill. 277."

Justice Strong, after quoting at length from the opinion of the Supreme Court of Illinois, proceeds as follows:

"In view of all this, ought this court to adhere to the construction we gave to the state constitution in ignorance of the fact that the Supreme Court of the state had previously construed it in a different manner? At a very early day it was announced that in cases depending upon the constitution or statutes of a state this court would adopt the construction of the statutes or constitution given by the courts of the state when that construction could be ascertained. In Nesmith v. Shel-

don, 7 How. 812, it is declared to be the 'established doctrine that this court will adopt and follow the decisions of the state courts in the construction of their own constitution and statutes when that construction has been settled by the decisions of its highest tribunal.' In Walker v. Harbor Comrs., 17 Wall. 648, we said: 'This court follows the adjudication of the highest court of the state in the construction of its statutes. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness.'"

The foregoing authorities show that this court has always held itself bound by the decision of the state court in the interpretation of the constitution and laws of the state. Yet, to sustain the contention of plaintiff in error, this court must decide that the amendment to the Oregon Constitution operated retrospectively, when the Supreme Court of Oregon has decided that it operated prospectively only. It must decide that the amendment applied to pending cases, when the Supreme Court of Oregon has decided that it applies only to charges brought subsequent to the adoption of the amendment. If the construction of the Supreme Court of Oregon is adopted it will not be denied that the prosecution of plaintiff in error has been with due process of law, but plaintiff asks the court to disregard the construction of the state court and construe the amendment adversely to the said court and hold that the amendment as thus construed will

deprive plaintiff of his liberty without due process of law contrary to the federal constitution. In view of the authorities cited, this the court will not do. No federal question, therefore, is raised by the first assignment of error, and if the court takes jurisdiction it must be by reason of the other assignments.

Assignment No. 2—Ex Post Facto Law.

As we stated before, this question was not raised in the Supreme Court of Oregon and is not properly before this court, but if it were properly here it would be unavailing to plaintiff in error, as a brief examination will show. It will be observed that it is alleged in the information that the crime was committed on the 9th day of September, 1907, but that Chapter 135 of the Laws of 1907, complained of as an **ex post facto** law, became effective May 26, 1907, more than three months prior to the alleged commission of the crime. As was stated by Mr. Justice Miller in Kring v. Missouri, 107 U. S. 225, "the term **ex post facto** necessarily implies a fact or act determined, after which the law in question is passed. Whether it is **ex post facto** or not relates in criminal cases, to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged it cannot, as to that offense, be an **ex post facto** law. If passed after the commission of the offense it is as to that, **ex post facto**,

though whether of the class forbidden by the constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its ex post facto character."

The law of 1907 is not an ex post facto law if it is not a criminal or penal statute as far as plaintiff in error is concerned. It is true the act makes it a crime and prescribes a penalty for the state treasurer to make a profit out of loaning the state's money, but it does not make criminal nor prescribe any penalty for any of the acts charged against the plaintiff in error in the information. The only relation that that act had to the prosecution of plaintiff in error was that it showed that plaintiff in error held the state's money as a trustee and not as a debtor. Plaintiff in error was accused under Section 1807 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon for converting to his own use money belonging to the State of Oregon. The acts charged in the information were in no wise prohibited by the law of 1907, which is claimed to be ex post facto, nor was any penalty prescribed for committing any of the acts charged in the information. The only provision of the act penal in its nature was a prohibition against the loaning of money by the state treasurer. The act, so far as it relates

to the prosecution of the plaintiff in error, is not penal or criminal, and therefore cannot be for that reason an **ex post facto** law.

It may be claimed by plaintiff in error that although the law of 1907 was passed before the date of the alleged crime, yet the effect given to it by the Supreme Court of Oregon in affirming the conviction of plaintiff in error was **ex post facto**, for the reason that the decision conflicted with the decision of the Supreme Court of Oregon in the case of Baker v. Williams, which latter case was decided prior to the alleged commission of the crime. This contention cannot be sustained for the reason that whether a law is **ex post facto** or not is determined solely by the time of the enactment of the law with reference to the alleged crime and not by the date of any judicial decision construing the law. The language of the constitution is that no state shall pass an **ex post facto** law. We think that this refers to a legislative enactment and not to a judicial decision. It has been uniformly held by this court that the prohibition against a state passing a law impairing the obligation of a contract referred to a legislative act and not a judicial opinion. The provisions that no state shall pass an **ex post facto** law, and that no state shall pass a law impairing the obligation of a contract are contained in the same clause of the federal constitution, and if one clause refers to a legislative enactment we can perceive no reason why the other should not. But in

any event the rule laid down in Baker v. Williams could not apply, for, as said by the Supreme Court of Oregon in deciding plaintiff's appeal, "the question involved here did not arise in that case and could not, as we are now controlled by the statute of 1907."

Assignment No. 3—Impairing the Obligation of a Contract.

The unsoundness of plaintiff's claim under this assignment is sufficiently demonstrated by a mere statement of it. It is that prior to the passage of the depository law the Trust Company had on deposit a portion of the funds of the State of Oregon; that under the authority of Baker v. Williams, 42 Ore. 213, supra, this was not a special but a general deposit, title to which passed to the company; that the relation between the company and the state was that of debtor and creditor, and not that of trustee and cestui que trust, and that therefore the funds, deposited as they were, could not be the subject of conversion; that the subsequent passage of the depository law, as construed by the Supreme Court of Oregon, changed this relation and made the deposit a special one, title to which remained in the state, so that instead of debtor the Trust Company became a trustee of the state funds with the result that a failure to pay over the same on demand would amount to a conversion within Section 1807 of the code under which the information

was brought; that this law as so construed impaired the obligation of the contract of deposit that had theretofore existed between the Trust Company and the state, and was repugnant to the federal constitution.

This question was raised for the first time in the petition for a writ of error, and is not properly before this court, as we have already shown. But, passing this objection without further argument, we will see what there is in plaintiff's contention.

The educational funds which plaintiff was charged with converting were deposited after the depository law went into effect, and that law became a part of the contract entered into by the state treasurer and the Trust Company. It could not impair the obligation of any contract unless a contract existed at the time the law became effective. It is the legislative act that must be subsequent to the contract and not a judicial decision construing the act, and such is the rule laid down by the decisions of this court. In the case of Turner v. Board of Commissioners, Wilkes County, 173 U. S. 461 (43 L. Ed. 768), we quote from the opinion as follows:

"The bondholders have brought the case here, claiming that by the decision below their contract has been impaired because, as they allege, the Supreme Court of the state had decided before these bonds were issued that the acts under which they were issued were valid laws and authorized their

issue, and that in holding the contrary after the issue of these bonds the state court had impaired the obligation of the contract, and its decision raised a federal question proper for review by this court.

"But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina because, this being a writ of error to a state court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject."

In the case of New Orleans Water Works Company v. Louisiana Sugar Refining Company, 125 U. S. 18 (31 L. Ed. 607), Mr. Justice Gray delivered the opinion of the court and said:

"In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state and not at the decisions of its court or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."

We quote from Bacon v. Texas, 163 U. S. 216 (41 L. Ed. 136), as follows:

"Where the federal question upon which the jurisdiction of this court is based arose out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause of the constitution, and so as to give this court jurisdiction on writ of error to a state court by some subsequent statute of the state which has been upheld or effect given it by the state court."

The same rule is laid down in the case of Central Land Company v. Laidley, 159 U. S. 103 (40 L. Ed. 91). A portion of the opinion is as follows:

"In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of a contract, not only must the obligation of the contract have been impaired, but it must have been impaired by some act of the legislative power of the state and not by a decision of its judicial department only."

Besides, in this case there was no contract that could be impaired. If prior to the depository law the deposit was general, as plaintiff claims it was, then the obligation of the Trust Company was to pay the money on the demand of the state. When the Legislative Assembly passed the depository law it in effect prohibited a general deposit of the educational funds, and was equivalent to a demand

on the Trust Company for the money it had on general deposit. By the operation of this law, then, the contract of general deposit was terminated and the Trust Company, by retaining the funds thereafter, became a trustee, and the title to the funds was in the state. If the state treasurer could terminate the contract of general deposit by a direct demand on behalf of the state, surely the legislature could terminate it by a law.

But if the law itself did not terminate the contract the Trust Company and the state treasurer did. On June 3, 1907, the treasurer withdrew the educational funds that were on general deposit and deposited them with the other funds with the Trust Company in a special account, designated by it "educational." In so doing both the treasurer and the company recognized the depository law and acted under its provisions, and the Supreme Court of Oregon so decided. This disposes of all the questions presented in the assignment of errors.

Respectfully submitted,

Geo. E. Cameron

A. M. Crawford atty gen'l

Martin L. Pipes

Attorneys for Defendants in Error.

NOTICE.

Sirs—Please take notice that upon the annexed verified statement of facts herein, and upon all the papers and proceedings herein, I shall submit to the Supreme Court of the United States at a stated term thereof, on Monday the 14th day of October, 1912, at the Capitol in the City of Washington, in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, and that I shall submit with said motion and in support of the same the argument and statement of facts annexed thereto.

Martin L. Pipes

Of Attorneys for Defendant in Error.

Portland, Oregon, ~~March~~ June 27 1912.

To

Wallace McCamant, Electric Building, Portland, Oregon.

William D. Guthrie, 44 Wall street, New York, N. Y.

Anthony Higgins, Ford Building, Wilmington, Delaware.

State of Oregon, County of Multnomah, ss.

I, Martin L. Pipes, one of the counsel for defendant in error, being first duly sworn, depose and say that I served the foregoing motion, statement

of facts, argument, brief and notice upon Wallace McCamant, one of the attorneys for plaintiff in error, by delivering to him personally at Portland, Oregon, on the 28. day of June, 1912, true copies thereof, certified by me to be such, and that I served the said papers upon William D. Guthrie and Anthony Higgins, counsel for plaintiff in error, by depositing true copies thereof, duly certified by me as such, in the postoffice at Portland, Oregon, on the 28. day of June, 1912, with postage thereon prepaid, said copies being directed to each of said counsel at their respective places of address as follows: To William D. Guthrie, 44 Wall street, New York, N. Y.; to Anthony Higgins, Ford Building, Wilmington, Delaware.

Marion L. Pope

Subscribed and sworn to before me this 28. day of June, 1912.

(Signed) A. M. Cannon,

Notary Public for Oregon.

Clerk United States District Court
District of Oregon

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